SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 731.

JERRY WALLACE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 THE UNITED STATES OF AMERICA:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the city of Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the third division of the judicial district of Kansas, wherein Jerry Wallace is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Cassius G. Foster, judge of the district court of the United States for the district of Kansas, third division, this 31st day of August, in the year of our Lord one thousand eight hundred and ninety-five.

CASSIUS G. FOSTER,
U. S. District Judge for the District of Kansas.

Service of the above citation is admitted this 31st day of August, A. D. 1895.

W. C. POVEY, *United States Attorney.*

2 (Indorsed:) #81. The U. S. of America vs. Jerry Wallace. Citation. Filed Aug. 31, 1895. Geo. F. Sharitt, clerk.

3 THE UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the district court of the United States for the third division of the judicial district of Kansas, greeting:

Because of the records and proceedings, as also in the rendition of a judgment of a plea which is in the said district court before you at the May term, 1895, thereof, between the United States of America as plaintiff and Jerry Wallace as defendant, a manifest error has happened, to the great damage of the said defendant, Jerry Wallace, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be there given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have said record and proceedings aforesaid at the city of Washington, District of Columbia, and filed in the office of the Clerk of the Supreme Court of the United States on or before the 14th day of October, 1895, to the end that the record and proceedings aforesaid being inspected the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, with the seal of said district court affixed at Topeka, Kansas, this 31st day of August, A. D. 1895.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Allowed by—

CASSIUS G. FOSTER, *Judge.*

4 (Indorsed:) ≠ 81. The U. S. of America vs. Jerry Wallace. Writ of error. Filed Aug. 31, 1895. Geo. F. Sharitt, clerk.

5 THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the said United States, in and for the third division of the said district, May term, 1895.

THE UNITED STATES OF AMERICA } Indictment for violation of section 5339, Revised Statutes of the United States.
vs.
JERRY WALLACE, }

At the term of the district court of the United States of America, in and for the third division of said district of Kansas, begun and held at Fort Scott, in the third division of said district, on the sixth day of May, in the year of our Lord one thousand eight hundred and ninety-five, the grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire of offenses committed within the third division of the district of Kansas, upon their oaths do find and present, that Jerry Wallace (whose more full Christian name is to the grand jurors aforesaid unknown), late of the third division of the district of Kansas aforesaid, on or about the 7th day of March, in the year
6 of our Lord one thousand eight hundred and ninety-five, at the Wyandotte Indian Reservation, the same being a place and district of country under the exclusive jurisdiction of the United States at the third division of the district of Kansas, and within the exclusive jurisdiction of this court, with force and arms, in and upon the body of one Alexander Zane, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Jerry Wallace, with a certain shotgun then and there charged with gunpowder and leaden bullets, which said shotgun he, the said Jerry Wallace, in his hands then and there had and held, then and there feloniously, wilfully, *wilfully*, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Alexander Zane, and that the said Jerry Wallace, with the leaden bullets aforesaid, out of the shotgun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Jerry Wallace discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Alexander Zane, in and upon the breast of him, the said Alexander Zane, giving to him, the said Alexander Zane, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the shotgun aforesaid, by the said Jerry Wallace, in and upon the breast of him, the said Alexander Zane, one mortal wound of the depth

of four inches and of the breadth of half an inch, of which said mortal wound he, the said Alexander Zane, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Jerry Wallace, him, the said Alexander Zane, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

RANKIN MASON,
Assistant United States Attorney.

7 (Indorsed:) No. 81. United States district court, third division. The United States vs. Jerry Wallace. Murder on Wyandotte Indian Reservation. A true bill. M. T. Cantrell, foreman. Witnesses: Eli Wallace, Wyandotte Res.; John Lemond, Wyandotte Res.; W. B. Balay, Wyandotte Res; Noah Zane, Wyandotte Res.; George S. Doane, Wyandotte Res.; Frank Denmark, Wyandotte Res.; Emma May Denmark, Wyandotte Res.; G. W. Glasebrook; Bob Mayfield, Seneca, Mo.; Sam Broderick, Seneca, Mo.; Columbus Griffin, Seneca, Mo.; T. L. Thompson, Seneca, Mo.; J. T. Baley, Seneca, Mo.; J. J. Power, Washington, D. C.; Mrs. Denmark, Wyandotte Reservation; Mrs. Alex. Zane, Wyandotte Reservation; Peter Mudeater, Wyandotte Reservation; Earl Houston, Wyandotte Reservation; Pat Riley, Samuel Robison, Lewis Latland, J. M. Doulas. Filed May 9th, 1895. Geo. F. Sharitt, clerk.

8 In the district court of the United States, district of Kansas, third division.

THE UNITED STATES)
vs.
JERRY WALLACE.)

Comes now the defendant and moves the court to quash the indictment herein for the cause and reason following, to wit:

First. That the same does not state facts sufficient to constitute an offense under the law.

Second. That it does not state in the first or jurisdictional part that the grand jury impaneled, sworn, and charged to inquire of offenses committed within the third division of the United States court for the district of Kansas had jurisdiction to inquire into the offense at the place where it is afterwards stated to have been committed in the substantive or charging part of the same.

Third. It does not state that it was so annexed to the third division of the State of Kansas, which said motion the court on the 14th day of June, 1895, overruled, to which action of the court in overruling said motion the defendant by his counsel then and there excepted at the time.

S. E. CHEESEMAN,
W. R. COWLEY,
JAS. H. PRATT,
Attys. for Defendant and for this Motion.

(Endorsed:) United States vs. Jerry Wallace. No. 81. Motion to quash the indictment. Filed June 13th, '95. Geo. F. Sharitt, clerk. By S. P. Mosher, dep.

9 In district court of the United States, 3rd division of the district of Kansas.

THE UNITED STATES)
vs.
JERRY WALLACE.)

Motion.

Now comes the defendant, Jerry Wallace, and appearing specially for the purposes of this motion, and moves the court that for and on account of the matters and things set forth in his plea to the jurisdiction of the court filed in support hereof, that the bill of indictment found against him for the crime of murder be quashed and held for naught, and that his plea to the jurisdiction be sustained and that he be discharged according to law.

S. E. CHEESEMAN,
JAS. H. PRATT, &
W. R. COWLEY,
Attys. for Defendant appearing specially herein.

(Endorsed:) No. 81. The United States vs. Jerry Wallace. Motion to quash. Filed June 13, 1895. Geo. F. Sharitt, clerk. S. E. Cheeseman, Jas. H. Pratt, & W. R. Cowley, attys. for deft. appearing specially herein.

10 In the district court of the United States, 3rd division of the district of Kansas.

THE UNITED STATES)
vs.
JERRY WALLACE.)

Plea to the jurisdiction of the court.

Now comes the defendant, Jerry Wallace, and entering his appearance herein only for the purpose of making this his plea to the jurisdiction of said court herein, as reason in denial of the jurisdiction thereof and in support of his said plea states:

That the regular term of the district court, 3rd division of the district of Kansas, is fixed by law and was to commence and be held in said 3rd division of the district of Kansas at the court-house of the United States in the city of Ft. Scott, Bourbon County, Kansas, on the first Monday of May, A. D. 1895, to wit: May 6th, 1895. That on said day and at the customary and usual hour for opening said term of court the Hon. C. G. Foster, judge of said court, was not present to open and commence said term, and no other judge of the United States court being present so to do, it was the duty of said judge, Hon. C. G. Foster, under the law and prior to the time for opening said term of court, when he found that he would be unable to be present in time to open the same, to make a written order directed to the United States marshal of said 3rd division of the district of Kansas, requiring him to adjourn said court until such day as he could be present to commence the same; that this was not done, and defendant

states that under the law said term of court could not be opened and adjourned on account of the absence of said judge by any other authority whatsoever.

And defendant further states that what was in fact done was as follows, viz: That on said day and at the customary and usual
11 hour for opening and commencing said term of court the Hon. C. G. Foster, judge thereof, was absent and no other judge being present to open the same, the deputy clerk thereof, without any authority in law so to do, adjourned said court until the next day, Tuesday, May 7th, 1895, at the hour of 9 o'clock a. m.

And defendant further states that the records of said court for Monday, May 6th, 1895, show in substance that said court was adjourned until Tuesday, May 7th, 1895, on account of the absence of the judge, and that the following officers were present: District attorney, marshal, and clerk, when in fact the marshal and clerk were not personally present.

And defendant further states that on Tuesday, the 7th day of May, A. D. 1895, the Hon. C. G. Foster, judge of said court, was present at the court-house at about the hour of 10 o'clock a. m. of that day, and commenced the work of said term so as aforesaid adjourned without authority of law to that day, and among other things impaneled the grand jury who had been summoned to attend said term of court to commence on Monday as aforesaid, and that said judge continued to hold said pretended term of court until about Friday, May 10th, 1895, when he adjourned the same to Wednesday, June 12, 1895.

And defendant further states that said grand jury, impaneled as aforesaid, among other things found a bill of indictment against defendant for the crime of murder, and he will be required to stand trial thereunder for his life unless this his plea to the jurisdiction of the court be sustained.

And defendant further states that for and on account of the matters and things hereinbefore set forth said term of court was not begun and commenced on the day and at the time fixed by law, and that no legal adjournment of said court was made until the next day when said judge
12 was present, and that said grand jury was unlawfully and illegally impaneled and that the bill of indictment so as aforesaid found by them was and is illegal and void for want of jurisdiction in the court to find and make the same, and any and all proceedings taken and had against this defendant at said pretended term of court are without jurisdiction and void, and defendant asks that this his plea to the jurisdiction be sustained, that the indictment so as aforesaid found by said grand jury against him be quashed, and that defendant be discharged according to law.

S. E. CHEESEMAN,
JAS. H. PRATT, &
W. R. COWLEY,
Attys. for Deft. appearing specially herein.

UNITED STATES OF AMERICA,
Bourbon County, State of Kansas, ss:

Jerry Wallace being duly sworn, upon his oath states that he is the defendant in the above-entitled action and has heard read the foregoing

plea to the jurisdiction of the court herein and knows the contents thereof, and the same is true to the best knowledge, information, and belief of the defendant.

JERRY WALLACE.

Subscribed and sworn to before me this 13 day of June, A. D. 1895.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Endorsed:) No. 81. The United States vs. Jerry Wallace. Plea to the jurisdiction. Filed Jun. 13, 1895. Geo. F. Sharitt, clerk. S. E. Cheeseman, Jas. H. Pratt, & W. R. Cowley, attys. for the deft. appearing specially herein.

13 In the district court of the United States, third division.

UNITED STATES)
vs.
JERRY WALLACE.)

Demurrer to plea in bar.

Comes now the United States and demurs to the plea in bar filed by the defendant and as ground of demurrer say that said plea is insufficient in point of law and fact, and fails to show any reason why the defendant should not be tried on the indictment now pending in this court against him.

W. C. PERRY, *U. S. Atty.*

(Endorsed:) 81. United States vs. Jerry Wallace. Demurrer to plea in bar, &c. Filed June 13, 1895. Geo. F. Sharitt, clerk. W. C. Perry.

14 UNITED STATES OF AMERICA,
District of Kansas:

At a term of the district court of the United States of America, for the district of Kansas, third division, begun and held at the city of Fort Scott, in said district, on Monday, the 6th day of May, 1895, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *June 13, 1895.*

THE UNITED STATES) No. 81. Murder on the Wyandotte Indian
vs. Reservation.
JERRY WALLACE.)

Now on this day comes as well the United States, by W. C. Perry, United States attorney for the district of Kansas, as the said defendant, Jerry Wallace, in his own proper person and by his attorneys, S. E. Cheeseman, James H. Pratt, and W. R. Cowley. Thereupon the said defendant, Jerry Wallace, is arraigned on the indictment herein. Whereupon the said defendant, Jerry Wallace, appearing in person and by his said attorneys, specially and for that purpose only, files his plea to the jurisdiction of this court and also his motion to quash the indictment herein.

Thereupon the plaintiff, the United States, by W. C. Perry, United States attorney for the district of Kansas, files its demurrer to the defendant's plea to the jurisdiction of this court. The said defendant, Jerry Wallace, being present in his own proper person and by his said attorneys, and said demurrer being argued by counsel and considered by the court, and the court being fully advised in the premises, it is now here by the court considered, ordered, and adjudged that the demurrer of the plaintiff to the defendant's said plea be, and the same is hereby, sustained, and the said plea to the jurisdiction is overruled and denied.

15 To which order and decision of the court the defendant, Jerry Wallace, at the time excepted.

Thereupon came on for hearing the motion of the defendant, Jerry Wallace, to quash the indictment herein, the United States appearing by W. C. Perry, United States attorney for the district of Kansas, and the said defendant, Jerry Wallace, being present in his own proper person and by his said attorneys. The said motion being argued by counsel and considered by the court, and the court being fully advised in the premises, it is now here by the court considered, ordered, and adjudged that the defendant's motion to quash the indictment herein be, and the same is hereby, overruled. To which order and decision of the court the defendant, Jerry Wallace, at the time excepted.

Thereupon the said defendant, Jerry Wallace, having been arraigned on the indictment herein, pleads not guilty thereto.

THE UNITED STATES)
vs.) No. 81. Murder on Wyandotte Reservation.
JERRY WALLACE.)

Now on this day comes as well the United States, by W. C. Perry, United States attorney for the district of Kansas, as the said defendant, Jerry Wallace, in his own proper person and by his attorneys, S. E. Cheeseman, James H. Pratt, and W. R. Cowley, whereupon both parties announced themselves ready for trial. And to try the matters submitted to them in this case came a jury of twelve good and lawful men of the body of the third division of the district of Kansas, to wit: Harry Ernich, Isaac Greenfield, J. F. End, D. H. Kurtz, Jacob Rodecker, M.

16 Q. Johnson, John Short, M. D. Elder, L. D. Herlocker, J. M. Allen, C. H. Hogeland, and D. D. Sturgis, who, being duly examined by the court and counsel, are empaneled and sworn to well and truly try the matters submitted to them in this case, and a true verdict render according to the law and the evidence.

Thereupon the trial of this case is proceeded with. The hour of adjournment having arrived and the trial of this case not being concluded, the jury are admonished of their duties by the court, and further hearing of this case is postponed until to-morrow morning at ten o'clock.

FRIDAY, *June 14, 1895.*

THE UNITED STATES)
vs.) No. 81.
JERRY WALLACE.)

Now come the parties hereto same as on yesterday, the United States appearing by W. C. Perry, United States attorney for the district of

Kansas, and the defendant, Jerry Wallace, being present in his own proper person and by his attorneys, S. E. Cheeseman, James H. Pratt, and W. R. Cowley; and the jury being called, answering to their names, and all being present, the trial of this case is proceeded with. The hour of adjournment having arrived and the trial of this case not being concluded, the jury are admonished of their duties by the court and placed in charge of their sworn bailiff, and further hearing of this case is postponed until to-morrow.

17 SATURDAY, *June 15, 1895.*

THE UNITED STATES)
vs.) No. 81.
JERRY WALLACE.)

Now come the parties hereto, same as on yesterday, the United States appearing by W. C. Perry, United States attorney for the district of Kansas, and the defendant, Jerry Wallace, being present in his own proper person and by his attorneys, S. E. Cheeseman, James H. Pratt, and W. R. Cowley. Comes also the jury heretofore empaneled and sworn herein, being called and answering to their names and all being present, and the trial of this cause is proceeded with. And the jury having heard all the testimony introduced by the parties, the arguments of counsel and the instructions of the court, retire to their jury room in charge of a sworn bailiff to consider of their verdict. And the jury having agreed upon their verdict return together into court, and being called and answering to their names and all being present, and the parties being present as heretofore, the defendant being present in his own proper person as well as by counsel; and the jury by their foreman present their verdict in writing to the court. Said verdict is in words and figures as follows, to wit:

In the district court of the United States for the district of Kansas, third division.

THE UNITED STATES)
vs.) No. 81.
JERRY WALLACE.)

We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant, Jerry Wallace, guilty of murder, as charged in the indictment.

J. RODECKER, *Foreman.*

18 Thereupon, by order of the court, the defendant being present in person as well as by counsel, the jury was polled in due form by the clerk, and each juryman answered for himself that the verdict as read by the clerk in the hearing of the jury was and is his verdict.

Thereupon it was ordered by the court that the defendant, Jerry Wallace, be remanded into the custody of the marshal to await the judgment and sentence of the court at some future day of this term of the court.

19 In the district court of the United States for the district of Kansas, third division.

UNITED STATES
vs. No. 81.
JERRY WALLACE.

We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths find the defendant, Jerry Wallace, guilty of murder as charged in the indictment.

J. RODECKER, *Foreman.*

(Endorsed:) No. 81. The United States vs. Jerry Wallace. Verdict. Filed June 15th, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clk.

20 *Defendant's instructions.*

The defendant requests the court to instruct the jury: That the defendant is presumed to be innocent until proven guilty; and before you can find him guilty of any offense under the indictment, you must be satisfied from the evidence beyond a reasonable doubt of his guilt, and if there is a reasonable doubt in your minds as to whether his guilt has been satisfactorily shown, then you must acquit him; and you are further instructed that the term reasonable doubt does not mean every vague or conjectural doubt, but it is a substantial doubt—a reasonable hypothesis—rising from the evidence, or lack of evidence inconsistent with the theory of defendant's guilt; and you must be convinced as jurors, when you would be convinced as men, in affairs pertaining to the graver transactions of life, and you should doubt as jurors when you would doubt as men in the graver transactions of life. If, therefore, in considering the evidence in this case, you find in your minds a reasonable doubt as to the guilt of the defendant, and this doubt is such a one as reasonable, prudent men acting in the graver transactions of life would make you hesitate and pause, then you should hesitate and pause as jurors, and if such a reasonable doubt arises in your minds as to the guilt of the defendant, then you must acquit him.

21 The defendant request' the court to instruct the jury: That murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense, or aforethought, express or implied. Malice is an essential element under the statute, and a specific, deliberately formed intention unlawfully to take life, either as expressly shown by the evidence or as implied by law, is a constituent element of the crime. To constitute this malice there must be shown that condition of the mind which shows the heart regardless of duty and fatally bent on mischief towards another person; and it is imperative that this malice exist at the time of the homicide, for if the killing be not committed out of present malice it is not murder.

If, therefore, you find and believe from the evidence that on the 7th day of March, A. D. 1895, that Alexander Zane, the deceased, was unlawfully trespassing upon the premises of defendant, to-wit, his home; and

if you further find from the evidence that he was wrongfully and unlawfully building a fence on the land of his daughter, who was and is the wife of the defendant; and if you further find and believe from the evidence that in building said fence upon Mrs. Wallace's land he was intending to take from and deprive defendant's wife of a portion of her land and appropriate the same to his own use; and if you further find and believe from the evidence that in attempting to carry out his purpose he came upon the premises of defendant's wife, with a force of men, teams, and material, passing by defendant, who was plowing in the field, and who ordered him to leave the premises; and if you further find from the evidence that defendant, after demanding that that deceased leave the premises, left his horses and went to the house, returning with his
22 gun to the near presence of the deceased; and if you further find from the evidence that after defendant had gone to his house the deceased, Alexander Zane, showed to John Lamont, a witness present, a tommahawk which he had concealed on his person, remarking that that was what the Indians used; and if you further find from the evidence that Alexander Zane, the deceased, had Indian blood in his veins; and if you further find and believe from the evidence that prior to this time there was ill feeling on the part of Alexander Zane against defendant, and that he had frequently made threats that he (Zane) would kill defendant; and if you further find that these threats, or any of them, had been communicated to defendant; and if you further find from the evidence that Alexander Zane was a quarrelsome man; and if you further find and believe from the evidence that defendant was a citizen of good character, peaceable in his character and deportment towards deceased; and if you further find from the evidence that when defendant came with his gun to the near vicinity of the deceased the deceased was again ordered to leave the premises; and if you further find from the evidence that just about this time the deceased made a threatening movement, raising his arm quickly to his side as if to draw a weapon, saying "Dam' you, I will kill you!" and if you further find from the evidence that at this time defendant's eyes were weak and his eyesight poor; and if you further find from the evidence that just about this time that defendant was struck in the back with a knife, by some person behind him, and at about the same instant was warned to look out; and if you further find from the evidence that at this particular time defendant believed or had reason to believe that his life was in danger or that great bodily harm was intended to him, and that, acting upon such belief, he fired his gun, inflicting upon deceased a gunshot wound; and if you further find and believe from the evidence that at the time thereof, or afterwards, and from the
23 effects of such gunshot wound Alexander Zane died, then you must find that at the time defendant fired the shot his condition of mind was not such as shows his heart to be regardless of duty and fatally bent on mischief towards Alexander Zane, and he must be acquitted.

24 The defendant requests the court to instruct the jury that homicide is always excusable when committed in the actual and necessary defense of the life or person of the slayer; but in order to maintain this defense it must appear that the defendant, when he fired the fatal shot, was acting under the reasonable belief that he was in imminent

danger of his life or feared great bodily harm from the deceased, and that it was necessary to fire the fatal shot in order to avoid the danger to his life or great bodily harm which was apparently imminent; that this existence of the reasonable apprehension of actual or apparent danger is to be considered from the standpoint of the defendant at the time of the homicide, and not from the standpoint of the jury in the light of the facts proved, and that the guilt of the accused must depend on the circumstances as they appeared to him.

If, therefore, you find and believe from the evidence that at the moment the defendant fired the fatal shot he believed or was acting under the reasonable belief that he was in imminent danger of his life or feared great bodily harm from the deceased or those with him, and fired the fatal shot to avoid such danger apparently imminent, then you must find that the defendant acted in self-defense and he is entitled to your verdict of acquittal. And you are further instructed that to maintain the plea of self-defense under such circumstances the danger need not be actual if the accused acted on a reasonable appearance and belief of danger.

25 The defendant requests the court to instruct the jury that homicide in defense of property is excusable when necessary to defeat or prevent the commission of a forcible or atrocious felony thereon.

If, therefore, you find and believe from the evidence that on the 7th day of March, A. D. 1895, Alexander Zane went upon lands in the peaceable occupancy and possession of the defendant and commenced to build a fence through and across the same, that such acts made him a trespasser, and defendant had the right to resist such trespass and eject him; and if you further find and believe from the evidence that in resisting such trespass it became necessary for the defendant to kill Alexander Zane in order to prevent the commission of a forcible or atrocious felony by the deceased, then your verdict must be for the defendant, acquitting him of the crime charged.

26 The defendant requests the court to instruct the jury: That the question whether under all circumstances there was grounds for a reasonable belief in the mind of the defendant that a necessity existed for taking the life of Alexander Zane is one for the determination of the jury, in the solution of which the condition of both of the parties at the time is a legitimate subject for consideration, and in determining what is sufficient ground for a reasonable belief in defendant's mind that such necessity existed, you are instructed that if at the moment just before defendant fired the fatal shot, he believed or had reason to believe that his life was in danger from deceased, or from those who were with him, or feared great bodily harm from him, or them, then you are instructed that the defendant was not required to wait until the deceased, Alexander Zane, gained a position equal to defendant's, or until deceased, Alexander Zane, was upon equal terms with defendant, but that he might lawfully slay him just as soon as it appeared to the defendant that a mortal combat was inevitable in which he might loose his life or suffer great bodily harm from Alexander Zane or those with him.

27 The defendant requests the court to instruct the jury: That in order for defendant to sustain his plea of self-defense, it is not necessary for him to show that Alexander Zane actually had a deadly weapon; it is sufficient to show for defendant in that respect that the

conduct of Alexander Zane was such as to induce a reasonable belief that he had one. If, therefore, you find and believe from the evidence that at the time defendant fired the fatal shot the conduct of Alexander Zane was such as to induce a reasonable belief in the mind of defendant that Zane had a deadly weapon, then you must find for the defendant on his plea of self-defense.

The defendant requests the court to instruct the jury: That the defendant has introduced evidence of his good character, which has not been controverted by the Government; that such evidence is to be considered by you, and is not merely of value in a doubtful case, but will of itself sometimes create a doubt, when without it none could exist.

If, therefore, you find and believe from the evidence that at all times prior to the fatal shot by defendant he was peaceful in his deportment and demeanor towards Alexander Zane, then you should acquit him, provided you find his good character towards Alexander Zane has been proven to your satisfaction.

The defendant requests the court to instruct the jury: That the question of the sufficiency of the evidence adduced by defendant to show that he committed the homicide in self-defense is one to be
28 determined by you, and the defendant need not show, either beyond a reasonable doubt or by a preponderance of proof; that he killed Alexander Zane in self-defense; it is sufficient if the evidence to that effect raises a reasonable doubt in your minds.

(Endorsed:) No. 81. United States vs. Jerry Wallace. Instructions asked for by defendant. All refused, but there are many of them that contain propositions of law that will be given by the court, but are so intermingled with objectionable propositions that none of them can be given as asked. Williams, judge. Filed Jun. 15, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

29 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the district court of the United States of America for the district of Kansas, third division, begun and held at the city of Fort Scott, in said district, on Monday, the 6th day of May, 1895, proceedings were had and appear of record in words and figures following, to wit:

TUESDAY, *June 18, 1895.*

THE UNITED STATES)
vs. No. 81.
JERRY WALLACE.)

Comes now the defendant herein, and by his attorney and with leave of the court files his motion to set aside the verdict of the jury heretofore returned and filed in this cause and grant a new trial of this cause, and also files his motion in arrest of judgment and sentence of the court upon the verdict returned by the jury in this cause.

30 In the district court of the United States, district of Kansas, third division.

THE UNITED STATES)
vs.
JERRY WALLACE.)

Motion for new trial.

Now comes the said defendant and moves the court to set aside the verdict of the jury heretofore rendered herein and grant a new trial of this action, and assigns the following grounds therefor:

1. The court erred in sustaining the demur'of the defendant's plea to jurisdiction.

2. The court erred in denying the motion to quash and for discharge of the defendant, supported by the plea to jurisdiction.

3. The court erred in summonsing a special venire of jurors ordered by the court herein on Wednesday, June 12th, 1895, as follows, viz: Harry Ernich, Ike Greenfield, J. W. Prager, Tom Tallman, Lip Kaiser, J. F. End, D. H. Kurtz, T. B. Williams, Thomas Brown, Wiley Bolinger, Jacob Rodecker, Jesse B. Smith, M. G. Johnson, C. W. Long, H. C. Loucks, J. C. Hanna, T. L. Myers, Homer Pond, C. Hahn, W. H. Kennison, G. W. Cassidy, E. E. Dix, J. P. Robins, Ben Files, Geo. Myers, Chas. Douglass, Chas. Love, J. Herrick, U. B. Pearsall, John Short, M. D. Elder, H. D. Herlockn, A. W. Burton, J. M. Allen, J. W. Martin, C. H. Hobeland, Gus McFadden, D. D. Sturgis, Thomas E. Burns, D. B. Woodson, John Forbes, H. R. Sadler, J. D. Orr. That on said day the court ordered that a panel of forty jurors be summoned, as required by law, returnable on Thursday, June 13th, 1895; that the marshal in executing the order of the court as to the said panel of forty-

31 two jurors only summoned about thirty-one of said jurors and not as required by law, but from the actual and immediate vicinity of Fort Scott, Kansas, the place where said court was held, and with the said thirty-one jurors, he added about the number of eleven of the regular jurors attending said court to make up the required number of forty-two jurors, and returned said mandate into court in compliance with the order so as aforesaid made to summons forty-two jurors; that one of the jurors so as aforesaid returned by him, to wit, one Woodson, was a member of the grand jury which found the indictment against this defendant in May, 1895, and could not for that reason have acted as a petit juror in this case; that at the term in May, 1895, and just prior to the adjournment of the court, his honor, Judge Foster, called the petit jurors before him and said to them in substance, "That court was adjourned to June 12th, 1895, and that he desired them all to return, but such of them as could not return on account of important business matters might remain at home, but that this must be arranged with the marshal;" that after said arrangements made as aforesaid by Judge Foster, and on or about the day of May, 1895, the defendant herein was served with a copy of the indictment, names of witnesses thereon, and list of jurors by whom he was to be tried, which said list of jurors contained the names of the regular panel of jurors summoned to

attend this court May 6th, 1895, and which by reason of the aforesaid arrangement made by his honor, Judge Foster, he could not be tried by at the adjourned term of court.

4. The court erred in requiring the defendant to go to trial in this action on Thursday June 13th, 1895, as follows, viz: That after said panel of jurors, summonsed and made up as aforesaid, the court directed that copy of the list of jurors, so as aforesaid returned, should be served upon the defendant's attorneys instead of requiring service to be
32 made upon the defendant, which was not done, and two days had not elapsed from any service of the list of jurors before the defendant was required to go to trial.

5. The court received improper evidence offered by the Government against the objection and exception of the defendant.

6. The court erred in excluding legal and competent evidence offered by the defendant.

7. The court erred in deciding and determining as to the number of peremptory challenges which might be exercised by the defendant and the manner of exercising the same.

8. The court erred in refusing proper instructions requested by defendant to be given to the jury.

9. The court erred in instructing the jury.

10. The court erred in ordering the record to be amended so as to show that Judge Foster was in town May 6th, 1895, when in truth and in fact he did not arrive in the city of Fort Scott, Kansas, until about nine o'clock p. m. of that day, and long after the court had been adjourned by the deputy clerk, as stated in defendant's plea to the jurisdiction of the court.

11. That no copy of the indictment with names of the witnesses thereon and list of jurors by whom defendant was to be tried was ever served upon the defendant as required by statute.

12. The court erred in refusing to permit defendant to cross-examine John Lamont, an eye witness to the transaction.

13. The court erred in refusing to permit defendant to make the witness John Lamont his witness after refusing to permit him to be cross-examined.

14. The court erred in refusing to permit defendant's attorneys to state to the court what they expected to prove by the witness John Lamont.

33 15. The court erred in refusing to allow defendant's wife to go upon the witness stand as a witness in his behalf.

JAMES H. PRATT,
S. E. CHEESEMAN,
W. R. COWLEY,
Attorneys for Defendant.

(Endorsed:) ⁼81. The United States vs. Jerry Wallace. Motion for a new trial. Filed June 18, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

34 In the district court of the United States, district of Kansas, third division.

THE UNITED STATES)
vs.
JERRY WALLACE.)

Motion in arrest of judgment.

Now comes the said defendant, after a verdict and before judgment and sentence, and moves the court that judgment and sentence herein may be arrested, and states as the ground of said motion as follows:

1. That the court erred in sustaining the demurrer of the defendant's plea to jurisdiction.

2. The court erred in denying the motion to quash and for discharge of the defendant supported by the plea to jurisdiction.

3. That the indictment herein does not charge a public offense, nor did the evidence as given on the trial prove a public offense.

4. And for other and further manifest defects in the record. Hence defendant prays that he be discharged.

JAMES H. PRATT,
S. E. CHEESEMAN,
W. R. COWLEY,
Attorneys for Defendant.

(Endorsed:) = 81. The United States vs. Jerry Wallace. Motion to arrest judgment. Filed Jun. 18, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

35 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the district court of the United States of America, for the district of Kansas, third division, begun and held at the city of Fort Scott, in said district, on Monday, the 6th day of May, 1895, proceedings were had, and appear of record, in words and figures following, to wit:

SATURDAY, *June 22, 1895.*

THE UNITED STATES)
vs. No. 81.
JERRY WALLACE.)

Now, on this 22nd day of June, A. D. 1895, the same being a regular day of the adjourned May, A. D. 1895, term of said court, come the parties hereto, the defendant, Jerry Wallace, being present as well in person as by his counsel, J. D. Hill, the United States being represented by W. C. Perry, United States attorney for the district of Kansas, and thereupon comes on for argument and hearing the motion heretofore filed by the defendant, Jerry Wallace, to set aside the verdict of the jury heretofore returned and filed in this cause and to grant a new trial of this cause, and said motion was argued by counsel. And the court having heard the arguments of counsel and having considered said motion and being fully advised in the premises, it is ordered by the court that said

motion be, and the same hereby is, denied and overruled. To which order and ruling of the court the defendant, Jerry Wallace, at the time said ruling was made did then and there except and excepts.

And thereupon by leave of the court the defendant, Jerry Wallace, being present in person as well as by his attorney, J. D. Hill,
36 presented for hearing and argument his motion in arrest of judgment, heretofore filed herein, and said motion was argued by counsel. And the court being fully advised in the premises doth upon consideration order that said motion be, and the same hereby is, overruled. To which order and ruling of the court the defendant, Jerry Wallace, at the time said order and ruling was made, did then and there except and excepts.

And thereupon, on this 22nd day of June, A. D. 1895, the same being a regular day of the adjourned May, A. D. 1895, term of said court, the defendant Jerry Wallace being present both in his own proper person and by his counsel, the United States being represented by W. C. Perry, United States attorney for the district of Kansas, W. C. Perry, United States attorney, moved the court for judgment and sentence of the court upon the verdict of the jury heretofore returned and filed in this cause.

Thereupon the court, after informing the defendant of the verdict of the jury in this cause, inquired of said defendant Jerry Wallace if he had any legal cause to show why the judgment and sentence of the court should not now here be pronounced against him. And no legal cause being shown by the defendant, nor by his counsel, and none appearing to the court, it is therefore now here by the court considered, ordered, and adjudged, and the sentence of the court is, that the said Jerry Wallace be taken hence by the marshal and by him held in custody in some suitable place until Friday, the twenty-seventh (27th) day of September, A. D. 1895, and that on said day, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon, of said day, the said Jerry Wallace be taken by the marshal of the United States for the district of Kansas to some suitable place of execution, to be selected by said marshal, in the city of Fort Scott, in the State and district of Kansas, and that the said Jerry Wallace be then and there hanged by the neck until he is dead.

37 In the district court of the United States for the district of Kansas, third division.

THE UNITED STATES OF AMERICA)
vs.
JERRY WALLACE.)

Petition for writ of error.

Your petitioner, the said defendant above named, respectfully represents to this honorable court that in said case lately pending in said court a verdict and judgment of conviction was rendered against him very greatly to his prejudice and injury, and which said verdict and judgment is erroneous and unjust in many particulars. That he desires to institute and prosecute proceedings seeking to reverse and correct the manifold errors committed in the proceedings and trial of said cause.

Wherefore in order that your petitioner may obtain relief in the premises and have opportunity of showing errors complained of he prays that he may be granted and allowed a writ of error in this case to the Supreme Court of the United States upon such terms as may be proper.

JAMES H. PRATT,
S. E. CHEESEMAN,
W. R. COWLEY,
Attorneys for Defendant.

(Endorsed:) #81. The United States of America vs. Jerry Wallace. Petition for writ of error. Filed Aug. 30th, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

38 In the United States district court for the district of Kansas, third division.

THE UNITED STATES OF AMERICA)
vs.
JERRY WALLACE.)

Assignment of errors.

STATEMENT OF CASE.

On the 6th day of May, 1895, the first day of the term of court, there were present Hon. W. C. Perry, U. S. district attorney; George F. Sharitt, clerk; Judge C. G. Foster being absent, also S. F. Neely, U. S. marshal. Thereupon, one Lou. F. Ashton, deputy U. S. marshal, adjourned said court.

And the clerk of said court made the following journal entry: "The judge being unable to attend at this day, court was adjourned until nine o'clock to-morrow morning." On the following day Judge C. G. Foster having arrived in Fort Scott, court was convened, and, among other proceedings had, the following indictment was found against the defendant, Jerry Wallace:

IN THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the United States in and for the third division of the said district, May term, 1895. Indictment for violation of section 5339, Revised Statutes of the United States.

THE UNITED STATES OF AMERICA)
vs.
JERRY WALLACE.)

At the term of the district court of the United States of America in and for the third division of said district, on the 6th day of May, in the year of our Lord eighteen hundred and ninety-five (1895), the grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire of offenses committed within the third division of the district of Kansas, upon their oaths do find and present that Jerry Wal-

lace (and whose more full and Christian name is to the grand jurors aforesaid unknown), late of the third division of the district of Kansas aforesaid, on or about the 7th day of March, in the year of our Lord
1895, at the Wyandotte Indian Reservation, the same being a
39 place and district of country under the exclusive jurisdiction of
the United States at the third division of the district of Kansas, and within the exclusive jurisdiction of this court, with force and arms, in and upon the body of one Alex. Zane then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Jerry Wallace in his hands then and there had, and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Alexander Zane, and that the said Jerry Wallace, with the leaden bullets aforesaid, out of the shotgun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Jerry Wallace discharged and shot off as aforesaid, then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Alex. Zane, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the shotgun aforesaid, by the said Jerry Wallace, in and upon the breast of him, the said Alex. Zane, one mortal wound of the depth of four inches and of the breadth of one-half inch, of which said mortal wound, he, the said Alex. Zane, then and there instantly died. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Jerry Wallace him, the said Alex. Zane, in the manner and the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States of America.

RANKIN MASON, *Asst. U. S. Atty.*

May 10th court adjourned to June 12th, 1895, at nine o'clock a. m.

June 12th, nine o'clock a. m., court convened, pursuant to adjournment of May 10th, 1895.

Present: Hon. John A. Williams, judge of the eastern district of Arkansas, by assignment; also Hon. W. C. Perry, U. S. dist. atty.; George F. Sharitt, clerk; Lou F. Ashton, deputy marshal.

40 On June (Thursday) the 13th day, 1895, the case of The United
States of America vs. Jerry Wallace being called, and the prisoner being brought into court, and also his attorneys, E. S. Cheesman, W. R. Cowley, and Jas. H. Pratt, being present, first filed their plea to the jurisdiction of the court, and also their motion to quash the indictment herein.

Thereupon, the plaintiff, The United States of America, by W. C. Perry, United States attorney, filed his demurrer thereto. After the argument of counsel, the court sustained the demurrer and the plea to the jurisdiction, to which ruling and decision of the court the defendant duly excepted.

The court also denied the motion to quash the indictment, to which ruling of the court the defendant duly excepted.

Thereupon, the defendant was required to plead to said indictment, and the plea of not guilty was entered.

The defendant next objected to going to trial at this term of the court, and especially at this day, because the panel of jurors summoned and

made up as required by law, the court directed a copy of the list of jurors so as aforesaid returned, should be served upon the defendant's attorneys, instead of requiring service to be made upon the defendant, which was not done, and two days had not elapsed from any service of the list of jurors before the defendant was required to go to trial, and from the further fact that only twelve of the original panel of jurors who had been summoned from the body of the district were present, to wit: John Short, D. M. Elder, L. D. Herlock, A. W. Burton, J. M. Allen, J. W. Martin, C. G. Hoagland, Gus McFadden, D. D. Sturgis, Thomas E. Burns, D. B. Woodson, and H. R. Sadler. The last-above-named jurors, belonging to the regular panel, were confined in the jury room deliberating upon their verdict in another trial had before said
41 court the day previous, and there being none of the regular panel of jurors from the body of the district to select from.

The defendant further objected to going to trial because the deputy marshal had the day before gone out in the town of Fort Scott and ordered the following persons to appear at the court-house next morning to serve as jurors, all being residents of the city of Fort Scott and personal acquaintances and friends of the Hon. W. C. Perry, U. S. district attorney, as aforesaid, and who were entire strangers to either the defendant or his attorneys, to wit: Harry Ernich, Ike Greenfield, W. W. Prager, Thom Tallman, Lip Kaiser, J. F. End, D. H. Kurtz, T. B. Williams, Thomas Brown, Wyley Boling, Jacob Rodecker, Jessie B. Smith, M. G. Johnson, C. W. Long, H. C. Loucks, J. C. Hanna, T. L. Myers, Homer Pond, C. Hahn, W. H. Kennison, G. W. Cassidy, E. E. Dix, J. P. Robens, Ben Files, George Myers, Charles Douglass, Charles Love, J. Herrick (deputy clerk of the court), and U. B. Pearsall. The defendant was compelled to go to trial with the above-named jurors so selected and order to appear at said court-house on said 13th day of June, 1895.

The defendant assigns the following errors as occurring at said trial:

1. The court erred in sustaining the demurrer to the defendant's plea to jurisdiction.

The court erred in correcting the journal entry of the clerk of this court made June 6th, so as to make it read: "The judge being in the city, but unable to attend at this day, court was adjourned by the marshal until nine o'clock to-morrow morning."

3. That the court erred in denying the motion to quash the indictment and for the discharge of the defendant supported by the plea to jurisdiction.

4. The said court erred in requiring the defendant to go to
42 trial in this action on Thursday, June 13th, 1895, for the reason that the panel was made up as aforesaid, and the further reason that after the said panel of regular jurors summoned and made up as aforesaid, the court directed that a copy of the list of jurors so as aforesaid returned should be served upon the defendant's attorneys, instead of requiring service to be made upon the defendant, which was not done, and two days have not elapsed from any service of the list of jurors before the defendant was required to go to trial.

6. The court erred in excluding a portion of Samuel Collins' testimony, a witness on behalf of the defendant, who, being asked, "Are you

acquainted with Alexander Zane's character for quarrelsomeness?" Ans. "Yes, sir; well, not to say I do myself, only what I have heard from others, is all I know about it." Q. "I will ask you what that character and reputation was in the community for quarrelsomeness?" To this question the plaintiff objected, and the court sustained the objection. The witness should have been permitted to answer this question, because a man's reputation is established by what others say about him, and the defendant should have been permitted to prove that Alex. Zane was a quarrelsome man, so that the jury would be better enabled to judge what Wallace had to fear from Zane if he was known to be a quarrelsome, turbulent man. Witness further testifies that Alex. Zane rode in a buggy with this witness, Collins, from Seneca home, and when asked the question, "Did he make any threats towards Jerry Wallace?" the court refused to permit the witness to tell what these threats were.

43 This testimony will be seen on page 53 of record.

7. In the testimony given by the defendant as a witness in his own behalf upon the trial, on page 62 of the record, he says that he was afraid of this party of men, and especially of Alex. Zane himself, and did not feel safe without some protection. This was why he took the gun in the field. He also testified that he had heard of the threats, and had different things communicated to him. Then the question was asked, "What were these threats about?" and he answered that "He would kill me." At this point the plaintiff objects, and the court sustained the objection, and the defendant was not permitted further to state to the jury what these other threats and communications were that had been made to him. He was further asked the question: Q. "You may state to the jury from that demonstration what you believed Zane was about to do?" The plaintiff objected, and the defendant was not permitted to state to the jury what eminent danger he believed himself to be in at that time, so that the jury could be able to determine from his position and from his condition of mind caused by previous threats what Zane would do, if the defendant believed himself in eminent danger, he should have been permitted to so state to the jury and why he so believed it.

8. Also, in refusing to permit the defendant to state to the jury the frequent threats that Alex. Zane had made against his life, and that these threats had been communicated to him, and especially to state what Zane had said and what he had done that caused the fear in the mind of the defendant, Jerry Wallace, that Zane would take his life or do him some great bodily harm. Also, that Zane had at one time driven Jerry Wallace out of his house at the point of a shotgun. All of these facts should have been permitted to go to the jury to better enable them to determine the reasonableness of the grounds of fear that existed in Jerry Wallace's mind at the time the shooting occurred, or just previous thereto.

44 9. Also, in refusing to permit the defendant, Jerry Wallace, to state to the jury the result of the controversy over the title to this land in the Indian courts, as it had been submitted to that Indian court, and went to show what had been done there and that this court had decided that this land belonged to Wallace's wife, and if he believed they were the rightful owners of this land and had a right to protect it, it would have a tendency to take away the idea of premeditated malice on the part of Jerry Wallace. (See records, pages 71 and 72.)

10. Also, in refusing to permit the defendant to exhibit to the jury the photograph of the field taken after the homicide. It had a tendency to prove the location of the grounds and convey to the minds of the jurors the position of the parties as it would be pointed out by this witness. (See record, pages 79 and 80.)

11. Also, in refusing to permit the plat of this land to go to the jury, showing the location of the house, the well, and all important points, made *and* by Mr. Patterson, the surveyor who surveyed the land, as the testimony showed that he, Patterson, had surveyed this land, and it was the land claimed and owned by Jerry Wallace, and tended to prove the land belonged to the defendant and his wife. (See record, pages 81 and 82.)

12. Also, in refusing to permit the witness, R. C. Patterson, to testify*ing* to the threats made by Alex. Zane the day before he went upon this land—that he intended to go down there and build a fence across this land, and that if he, Jerry Wallace, the defendant, fooled with him he would kill him. And further, that the *they* had bought whiskey for the purpose of his own use, and that of the men he was to take down with him the next day upon this land for the purpose of taking possession of it and building a fence across it. (See record, pages 84 and 85.)

45 13. Also, in refusing to permit the testimony of Charles Duke to go to the jury, wherein the defendant offered to prove by this witness that the day before the killing, while in the town of Seneca, Alex. Zane said that he was going down to build a fence across Wallace's land, and if Jerry Wallace interfered with him he would kill him, or shoot the blind son of a bitch, and that these threats were communicated to Jerry Wallace. (See record, page 86.)

14. Also, refusing to permit the testimony of Mrs. Alice Sargent to go to the jury, wherein she states, or offered to state and prove, that Alex. Zane, while in the kitchen of this witness, that he would kill Jerry Wallace, and that he had a knife that he was carrying for that purpose, and that she had communicated these threats to Jerry Wallace. (See record, page 87.)

15. The court also erred in refusing to permit Hugh Lester, a witness on behalf of the defendant, who testifies that he helped survey the land in dispute between Zane and Wallace, and that Power, the surveyor, had permitted Zane to move one of the monuments; and that Zane had carried the chain while surveying this line, and that he said the reason he wanted to carry the chain was that he wanted to gain four feet on each chain so as make his corner where he wanted it. (See record on page 89.)

17. The court also erred in excluding the testimony of Samuel Taylor, who testified to having a conversation with Alex. Zane on the 6th day of March, the day before the homicide—that on the road from Seneca to his house; the following question was asked: "In that conversation did Zane say anything about Jerry Wallace as to doing something to him, and if so, what was it?" Objected to and objection sustained. The defendant then made the offer of proof that the day before the homicide Alex. Zane had a conversation with this witness in which he said he would kill Jerry Wallace if he interferred with him in any way, and that these

46 *these* threats were communicated to this defendant. (See record, page 90.)

18. The court also erred in refusing to permit the witness, Samuel Collins, to testify in regard to the threats made by Alex. Zane against Jerry

Wall'ce, and that these threats had been communicated to Jerry Wallace. Defendant offered to prove by this witness that a short time before the 7th of March he met Alex. Zane and had a conversation with him about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace, and said to this witness that at one time he made him look down the muzzle of a double-barreled shotgun, and he wished he had killed him at that time. (See record page 91.)

19. The court also erred in refusing to permit Mary Crow, a step-daughter of Alex. Zane, a witness on behalf of the defendant, to testify in regard to the threats Alex. Zane made against the life of Jerry Wallace to her, and that she communicated these threats to him, which was as follows: Q. What relation, if any, was he to you?—A. Stepfather. Q. Now, I will ask you from that knowledge of him you have any knowledge of his going armed at all times?—A. He had a butcher knife with him all the time. Q. Where did he carry it, if you know?—A. He carried it around his belt. Q. Did you, a short time before the homicide on the 7th of March, have a conversation with Alex. Zane about Jerry Wallace?—A. No, sir. Q. Or did you hear one?—A. Yes, sir; I heard one. Q. Were you present when Zane talked?—A. Yes, sir. Q. Did he talk about Jerry Wallace?—A. Yes, sir. Q. In that conversation did he threaten to do something to Jerry Wallace; if so, what was it? Plaintiff objects, and the objection sustained. Defendant offered to prove by this witness that at this time she heard Alex. Zane say he intended to kill Jerry Wallace and that she communicated these threats to Jerry Wallace.

S. E. CHEESMAN,
W. B. COWLY,
JAMES H. PRATT,
Def't's. Attys.

47 (Endorsed:) No. 81. The U. S. of America vs. Jerry Wallace. Assignment of errors. Filed Aug. 30th, 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

48 In the district court of the United States, district of Kansas, third division.

THE UNITED STATES,)
vs.) No. 81.
JERRY WALLACE.)

Bill of exceptions.

Now, on this 13th day of June, 1895, at the adjourned term of the regular May term of court, this cause came on for trial before the court and jury, and, the jury having been duly empaneled and sworn to try the issues herein joined, the Government, to maintain the issue upon its part, offered the following evidence:

49 ELI WALLACE, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by W. C. PERRY:

Q. State your name and residence.
A. Eli Wallace; I live in the Wyandotte Reservation.

Q. Where is the Wyandotte Reservation from Baxter Springs in this State?

A. It lays southeast of Baxter, something like twenty miles, I suppose.

Q. How long have you lived there, Mr. Wallace?

A. About nine year', I guess.

Q. Do you know the defendant, Jerry Wallace?

A. Yes, sir.

Q. How long have you known him?

A. For four or five years.

Q. You are not related to him, as I understand?

A. Not that I know of.

Q. Did you know Alexander Zane?

A. Yes, sir.

Q. How long have you known him?

A. I don't know exactly how long I have known him—six or seven years, perhaps, that I knew him when I saw him.

Q. How old a man was he?

A. I don't know his age, but I presume he was a man forty-five or fifty years; don't know what his age was.

Q. What was his occupation?

A. Farmer, I suppose.

Q. Where did he live?

A. In the Wyandotte Nation.

Q. What was his race?

A. He claimed to be an Indian.

Q. Of what race or tribe?

A. Wyandotte.

Q. As a matter of fact, was he full blood, or what?

50 A. I don't know what part he was; he was not full blood.

Q. Where did the defendant, Wallace, live?

A. In the Wyandotte Nation.

Q. How far from Alexander Zane?

A. I don't know exactly—something near a mile, I reckon.

Q. What relation, if any, was Zane to the defendant, Wallace?

A. He was his father-in-law.

Q. Did you see Zane and Wallace on or about the 7th of March last?

A. Yes, sir.

Q. Where?

A. I saw Zane at home, and I saw Mr. Wallace on his place.

Q. Did you see anything over there between them that day?

A. Yes, sir.

Q. What was it?

A. I saw Mr. Wallace shoot Mr. Zane.

Q. Where was he when he shot him?

A. He was up in the field.

Q. In what field?

A. Up there in the nation.

Q. In what nation?

A. In the Wyandotte.

Q. What time in the day was it?

A. Something near nine o'clock in the morning.

Q. In the morning?
A. Yes, sir.
Q. What did he shoot him with?
A. Shotgun.
Q. How did it happen, Mr. Wallace, that you were there?
A. I was employed by Mr. Zane to work for him.
Q. What time did you go there?
A. I don't know, exactly; it must have been along—well, I don't know just what time it was; must have been between seven or eight o'clock.
Q. Where did you go from to the place where the shooting took place?
A. I went from home.
Q. In company with Zane?
A. No, sir; I went down to Mr. Zane's by myself.
51 Q. Did you go from his house to this place with him?
A. Yes, sir.
Q. Who else, if anybody, was along?
A. Will Bailey and Mr. Zane's son.
Q. That was all that were with you?
A. Yes, sir.
Q. How did you go down?
A. In the wagon.
Q. The four of you in the wagon.
A. We were loading posts as we went along. We didn't ride in the wagon. We walked and drove along.
Q. You just went along with it.
A. Yes, sir.
Q. Was anybody else there besides the persons you have named?
A. Not when we left the house.
Q. At the field that you speak of, did you see the defendant, Wallace?
A. Yes, sir; after we drove in the field.
Q. What was he doing?
A. He was ploughing.
Q. Was anybody else there?
A. Yes, sir.
Q. Who?
A. Mr. Lewis and Mr. Denmark was there.
Q. What first took place—what first occurred after you got there?
A. We drove through the field, and as we drove through to go to work Mr. Wallace was ploughing over there, and he ordered Mr. Zane out.
Q. Did he leave his ploughing and come over to where you were?
A. No, sir.
Q. How far apart were you?
A. Mr. Zane and Mr. Wallace?
A. Yes, sir.
A. Something near sixty or seventy yards, I presume.
Q. Give the jury the exact language used by Mr. Wallace.
A. He said: Mr. Zane, or Alex Zane, if this is your force, take it and get out of here, and Mr. Zane walked right on, and he said
52 it again: If this is your force, take it and get out of here immediately.

Q. Did Zane say anything?
A. No, sir.
Q. Did he do anything?
A. Nothing that I saw.
Q. What did Wallace do then?
A. He plowed on down to the end of the furrow and unhitched his team and left the field.
Q. Was there anything else said or done at that time but what you have told?
A. Mr. Wallace's wife saw us coming and she went down to the field and ——
(Objected to by defendant.)
Q. Well, that was all that transpired between Wallace and Zane?
A. All that I heard; yes, sir.
Q. After Wallace left the field what did Zane do?
A. He went up there and went to work.
Q. At what?
A. Putting up fence and driving posts.
Q. Did you see Wallace again?
A. Yes, sir. After he left the field he came back.
Q. How long before he come back?
A. It must have been a half hour, I guess.
Q. Where did he go, if you saw, when he left the field the first time?
A. I don't know.
Q. Where was he when you next saw him?
A. In the field.
Q. What was he then doing?
A. Coming toward Mr. Zane.
Q. Walking or riding?
A. Walking.
Q. What had he?
A. A gun.
Q. How far was he from Zane when you saw him?
A. About thirty or forty yards.
Q. In what way did he have the gun?
A. Down this way [illustrating]; carrying it in his hands as far as I could see.
Q. Where was you from Zane?
A. East, about one hundred yards.
53 Q. Was there anything between you and Wallace?
A. No, sir; there was nothing between us.
Q. What was the first thing either one of them said, if they spoke?
A. Never heard a word they said. All I heard was what Mr. Wallace said when we first went into the field.
Q. What was Zane doing when you first saw Wallace thirty or forty yards away?
A. He was holding a stake that he had set up for to run the fence by.
Q. To run by for the fence?
A. Yes, sir.
Q. What happened then?
A. Mr. Wallace walked up and shot him.

Q. How far was he from Zane when he shot?
A. I would judge fourteen or fifteen feet.
Q. Did you see Zane when the shot was fired?
A. Yes, sir.
Q. Describe to the jury how he was standing and what he was doing, if anything?
A. He was standing with his right hand on the post, and Wallace walked right up to him and never made no attempt to move, that I saw, after he shot him.
Q. Where was his left hand?
A. As near as I can remember, he was standing like this [illustrating], with his right hand on the post and his left hand hanging by his side.
Q. Facing Mr. Wallace?
A. Yes, sir—well, not exactly, either.
Q. Well, show the jury by me just how he was standing. [Here Mr. Perry stood up and witness illustrated the position.]
Q. What did he do, if anything, after Wallace shot him?
A. He turned around and run a little piece, kind a doubled over, and fell dead.
Q. How far did he go before he fell dead?
A. Thirty or forty rods, I suppose.
54 Q. What did Wallace do after he fired the shot?
A. He turned around and started back.
Q. Where was Bailey?
A. He was right up there where I was.
Q. You and he were about together?
A. Yes, sir.
Q. Where was Noah Zane?
A. Standing there close to us.
Q. Where was Mr. Denmark?
A. About thirty or forty yards south of where Wallace shot Zane.
Q. You were about one hundred yards east?
A. Yes, sir; something near that.
Q. You said Mr. Lewis was there, too?
A. Yes, sir.
Q. Where was he?
A. Up there with Denmark.
Q. When was that, Mr. Wallace?
A. March 7th.
Q. What year?
A. This year.
Q. Where did Wallace go after he shot Zane?
A. Well, he went back up there to where these other parties were standing.
Q. Up to where Denmark was?
A. Yes; he stopped there for awhile.

Cross-examination by Mr. COWLEY:

Q. What is your age, Mr. Wallace?
A. I am thirty-three years old.
Q. Native of America?
A. Yes, sir.

Q. Where are you residing at this date?
A. In the Wyandotte Nation.
Q. I believe you said you lived there for the period of nine years.
A. Yes, sir; something near that.
Q. Engaged in farming?
A. Yes, sir.
Q. Are you the owner of a farm, or do you lease in the nation?
Q. Where did you live before you lived in the nation?
55 A. I have lived in Kansas.
Q. Whereabouts in Kansas?
A. In Cowley County.
Q. At a little place called Burden?
A. No; Dexter.
Q. That was at the junction?
A. There was no road there.
Q. When did you remove from there?
A. I do not recollect just how long ago since I moved there, but it has been eleven years ago, I think.
Q. Engaged in what business there?
A. Farming.
Q. How close to the village of Dexter did you live?
A. I lived in Dexter awhile.
Q. Farmed in the valley below?
A. Above.
Q. Where did you move from to Dexter?
A. Missouri.
Q. What part of Missouri?
Francois County.
Q. What place?
A. Near Farmington.
Q. How long did you live there?
A. Fourteen years.
Q. Engaged at what business at that point?
A. Farming.
Q. What place did you move to from Francois County?
A. Illinois.
Q. What portion of Illinois?
A. Shelby County.
Q. How near from Shelbina?
A. Six miles, I believe.
Q. How long did you live in Shelby County?
A. I was so small I don't remember.
Q. Do you recollect what your age was when you lived in Shelby County?
A. No, sir.
Q. You were not born in Shelby County?
A. No, sir.
Q. In Indiana?
A. Yes, sir.
(Plaintiff objects, as it is immaterial. Objection sustained.)
Q. You came to Wyandotte Reservation about nine years ago?

A. Yes, sir; about nine years ago.

56 Q. Been engaged in leasing lands since you have been there?

A. I have leased some land. Have not been altogether engaged in leasing.

Q. You have been acquainted with Jerry Wallace about five years?

A. I don't recollect just how long I have known him.

Q. How long have you been acquainted with Mr. Zane?

A. I have known him some longer than Wallace.

Q. You were working for Mr. Zane a good deal?

A. Not very much.

Q. Upon the morning of the 7th you went from your home to Mr. Zane's?

A. Yes, sir.

Q. What is the distance from where you reside to where Mr. Zane lives?

A. Something near a half a mile, I suppose.

Q. You had been talking with Mr. Zane some time before that about going there that morning—two or three days before?

A. Yes, sir.

Q. You were told the purpose for which you were wanted there?

A. Yes, sir.

Q. Did he tell you who else was to be there that morning?

A. No; he didn't exactly tell me who else was to be there.

Q. Did you know who was to be there?

A. I didn't for certain.

Q. Did you walk or ride from your residence to Mr. Zane's?

A. I rode.

Q. Was anyone in company with you?

A. No, sir.

Q. Took your team, did you?

A. Yes, sir.

Q. And your wagon?

A. Yes, sir.

Q. When you reached the residence of Mr. Zane who did you

57 find there?

A. Mr. Zane and his boy.

Q. That is, Noah Zane?

A. Yes, sir.

Q. Nobody else?

A. No one else except the family of Mr. Zane.

Q. Did you have any conversation with Mr. Zane then?

A. Not to amount to anything.

Q. About what hour do you think it was when you reached Mr. Zane's?

A. I don't remember; I couldn't just tell what hour it was.

Q. Well, in your judgment?

A. It might have been something near six o'clock; it was early in the morning.

Q. How long did you remain at the residence of Mr. Zane?

A. I never got off the wagon.

Q. Did you load any posts there?

A. Not at the house.

Q. Then where did you go to?
A. We went to where we had some posts made.
Q. What direction was that from Mr. Zane's?
A. It was southeast.
Q. Who accompanied you to the timber?
A. Mr. Zane and Will Bailey.
Q. Anybody else?
A. His son, Noah Zane.
Q. There were you four, then, in the timber?
A. Yes, sir.
Q. About what time was it when you were at the timber?
A. I can't tell you.
Q. In your judgment what time was it?
A. I presume it was not more than twenty-five minutes after six; somewhere along there.
Q. It was not more than twenty-five minutes after six?
A. That is my judgment.
Q. How long did it take you to load your posts?
A. I suppose it took us fifteen or twenty minutes, I suppose.
58 Q. It was, then, somewhere near the hour of seven o'clock when you got your posts loaded and started for the field?
A. I suppose so; somewhere along there.
Q. Took you about how long to go from where you loaded the posts to the field?
A. It took us from a half-hour to three-quarters, maybe.
Q. So you would reach the field not far from eight o'clock?
A. No; not far from eight.
Q. Where did you enter the field that morning?
A. At the southwest corner.
Q. Is that near the place where there is a chimney standing?
A. Well, no; it is north of that chimney.
Q. But it is in the direction from Mr. Zane's towards the chimney?
A. Yes, sir.
Q. The chimney is inside of the field?
A. Yes, sir.
Q. Did you enter through the fence or the opening of the gate?
A. Through the fence.
Q. Was the fence down or were you compelled to place it down?
A. It was down; Mr. Zane had it down—he had it down that morning.
Q. After entering the field in what direction did you drive?
A. We drove into the field about a quarter or half a mile.
Q. In what direction as to the points of the compass?
A. East.
Q. Cross any of the ravines?
A. Yes, sir.
Q. Did you notice anyone in the field at the time you entered it?
A. Yes, sir.
Q. Did you know the persons?
A. Not when we first entered the field; we couldn't see them plain.
Q. Was it sunrise at the time you entered the field?
A. Yes, sir.

59 Q. They were in what direction from you when you entered the field?

A. East.

Q. They were engaged in what work?

A. Plowing.

Q. How many were there?

A. There were two when we reached the field.

Q. Are you now able to say who they were?

A. Mr. Denmark and Wallace.

Q. Were they ploughing east and west or north and south?

A. East and west.

Q. Did the land extend to the State line east?

A. Yes, sir; the ground they had been ploughing on did.

Q. How near did you pass to them as you went by?

A. I suppose something like sixty or seventy yards as we went by Wallace.

Q. How far from Denmark?

A. I couldn't tell you; and how I come to notice Wallace was by his hollering.

Q. Did you pass to the north of them as you went east?

A. Yes, sir.

Q. About seventy yards from Mr. Wallace?

A. Sixty or seventy, I suppose; somewhere along there.

Q. Were you driving or Mr. Zane?

A. I was driving.

Q. What did Wallace say? Give his language as near as possible.

A. He said, "Alex Zane, if that is your force take them and get out of here immediately."

Q. I will ask you if he didn't say this: "Alex Zane, take your mob and posts and get out of this?"

A. No, sir.

Q. Then where did he pass you and Mr. Zane?

A. To the right of us.

Q. Up to the east end of that field, running along the State line, is a rail fence?

A. Yes, sir.

60 Q. And part of it is made of stone?

A. Not that I noticed.

Q. There is a fence upon the north of the field?

A. Yes, sir.

Q. Running close to the edge of the timber or bushes?

A. Yes, sir.

Q. Now, you went to a point of the fence on the east line of the field, about how far from the fence north?

I suppose it was 120 feet, somewhere along there.

Q. Somewhere in the neighborhood of 120 feet?

A. Yes, sir.

Q. Did Mr. Zane go with you to that fence?

A. Yes, sir.

Q. Did Noah Zane?

A. Yes, sir.

Q. Bailey?
A. Yes, sir.
Q. Where did the man Lamont join you?
A. At the fence, when we went in the field at the southwest corner.
Q. Went with you to the east line?
A. Yes, sir.
Q. When you reached the east line you threw out some posts?
A. No, sir.
Q. Where did you throw your posts off?
A. I never threw any of mine off, I took them off the wagon as I used them.
Q. They were not throwed out that day?
A. Some of them were.
Q. Was there another wagon?
A. Yes, sir.
Q. Who was driving that?
A. Noah Zane.
Q. Then you had two wagons of posts?
A. Yes, sir.
Q. How long did Mr. Zane remain at the east end of the field?
A. I don't know; I couldn't say just what length of time he was there.
Q. Are you able to say where Jerry Wallace was?
A. When we were at the east end of the field he left the field while we were up there.
Q. At what point did he leave the field?
A. I couldn't exactly say what point; I couldn't state at what point.
61 Q. Did you see him when he left the field?
A. Yes, sir.
Q. Did he leave the field below the gate which passes to his residence?
A. Yes, sir; he unhitched below the gate.
Q. But did he leave below the gate; there is a gate goes to his residence?
A. Yes, sir, I know there is; that opens into his barnyard in the neighborhood of about sixty or seventy feet. Well, sir, he unhitched south of that gate, as near as I could see.
Q. Did he pass through the field at some other point?
A. He left the field, but I couldn't say as to where he went through it.
Q. You don't know at what point he left at?
A. No, sir.
Q. How long did Mr. Zane remain with you up to the east line?
A. I couldn't say exactly; I couldn't give you the minutes.
Q. Well, in your judgment?
A. According to my judgment he was up there, maybe, about twenty or thirty minutes; couldn't say for certain.
Q. That would be bringing it somewhere near the hour of half past eight or nine o'clock?
A. Yes, sir; I think it would.
Q. Where did Mr. Zane go to then?

A. He taken a post and went back west and set it on the line down there.

Q. How far from the gate that goes from the residence did he go?

Q. I suppose it was something near one hundred and fifty yards, perhaps.

Q. And to the south?

A. Yes, sir; south and east.

Q. Where did Noah Zane go?

He went on down towards his father, farther west.

Q. Where did Lamont go to?

A. He stayed up there with us fellows.

62 Q. Were you singing that morning?

No, sir.

Q. Was any of your crowd singing?

A. I don't remember of hearing any singing going on.

Q. Did you have any liquor with you that morning?

A. Yes, sir.

Q. Took a jug with you that morning?

A. No, sir.

Q. Was it in bottles?

A. Yes, sir.

Q. Were you drinking some that morning?

A. Yes, sir; a little.

Q. Mr. Zane was drinking some?

A. I presume he was.

Q. How long had Mr. Zane been at the east end when you again saw Wallace?

A. It was perhaps something near a half hour.

Q. Do I understand you correctly when you say that Mr. Zane had been near a half hour?

A. When Wallace came into the field?

Q. I am asking you how long Mr. Zane had been at the east end when you again saw Wallace.

A. It was not more than fifteen or twenty minutes, I suppose, as near as I can tell; of course I can't exactly tell.

Q. Where did he come from?

A. From the north.

Q. Did you see him when he entered the field?

A. I never saw him until after he was in the field.

Q. You were then about seventy yards from where Zane was?

A. About a 100 I expect.

Q. You were east of Zane?

A. Yes, sir.

Q. Could you hear what was said between them distinctly?

A. No, sir.

Q. When Jerry came in the field, what was Zane doing?

A. Standing; holding his hand on the post.

Q. I understand you to say his right hand?

A. Yes, sir.

Q. Which way was he facing; a little to the north?

A. Northeast like.

63 Q. Was he north or south of the post?

A. A little north.

Q. Well, if this was the post here [illustrating] here, was he looking to the north?

A. Yes, sir.

Q. Was he resting or his arms stretched out?

A. No, sir.

Q. Did Jerry come from the north?

A. Yes, sir.

Q. Did Zane change his position as Jerry approached him?

A. He just turned a little bit, as I could see.

Q. Which way?

A. Facing him.

Q. What motion, if any, did he make with his hand?

A. I never saw him make any at all.

Q. You are not able to say whether he made any motion or not?

A. I didn't see him make any motion.

Q. Was there anything then said by any person?

A. Nothing that I heard.

Q. How near was Lamont at that time from Zane?

A. Something near a hundred yards.

Q. He was close to you?

A. Yes, sir.

Q. Where was Lewis?

A. He was down there with Denmark.

Q. How far were they from these parties and where Mr. Zane stood at the post?

A. Thirty or forty yards, maybe.

Q. What direction?

A. North.

Q. You gave testimony in the preliminary examination?

A. Yes, sir.

Q. I will ask you if you did not testify in the preliminary examination that he was resting his left hand upon the post?

A. No, sir; I did not.

Q. After Jerry Wallace fired the shot you say he turned. What direction did he walk?

A. To the east.

Q. About how far?

A. About thirty or forty rods, I presume.

Q. At the time he turned and then walked to the east where

64 was Noah Zane?

A. He was about five or six feet, perhaps, from Mr. Wallace the first that I noticed of him.

Q. That was the first that you noticed Noah?

A. Yes, sir.

Redirect examination by W. C. PERRY:

Q. Mr. Wallace, did you notice where the shot struck Zane?

A. Yes, sir.

Q. Where?

A. Right in the left breast.

Q. You told Mr. Cowley that you had a bottle of whiskey, and that you men had been drinking. Did you mean by that that you were intoxicated?

A. No, sir.

Q. What had you taken that morning?

A. I had taken two drinks that morning out of the bottle.

Q. What was Zane's condition?

A. He appeared straight.

Q. Did you know the amount of drinking he had done?

A. I did not, sir.

Q. How big a bottle did you have?

A. Quart bottle.

Q. Was it full?

A. Yes, sir; when we started it was pretty well filled up.

Q. How much had you drank out of it when Zane got killed?

A. There was about half of it in the bottle.

Q. Counsel asked you if you had not had trouble with Jerry Wallace.

A. Yes, sir.

Q. You did not mean to say that you had any fist fight or anything like that—just a sort of word quarrel?

A. Yes, sir.

Q. You didn't hit him or anything of that kind?

A. No, sir.

65 FRANK DENMARK, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Your name is Frank Denmark?

A. Yes, sir.

Q. Where is your home?

A. Wyandotte Reservation.

Q. How long have you lived there?

A. Only since April 17th.

Q. Of what year?

A. This year.

Q. You don't belong to the Wyandottes?

A. No, sir.

Q. Were you down there in March last?

A. I was working there, but did not live there.

Q. What were you doing there?

A. I was plowing.

Q. Who for?

A. Jerry Wallace.

Q. The defendant here?

A. Yes, sir.

Q. Did you know Alexander Zane?

A. Not at that time at all. I saw him when he come into the field and they said that was who it was.

Q. Where were you and where was Jerry Wallace at the time that party came into the field?

A. I was plowing and Jerry Wallace was also plowing in the same field.

Q. Close together or how?

A. When I first saw him he was pretty near at one end and I was at the other; it was not half crossway across the field; he was not quite at the other end and I was not quite at the west end.

Q. How long was that field?

A. About sixty rods.

Q. Did Zane come down pretty close to where you were?

A. He went through the field, don't know just how far, but it must have been 100 or 150 yards from where I was.

66 Q. Did you know any of the men in the wagon?

A. No, sir; not at that time.

Q. What, if anything, did Wallace say to Zane when he came into the field, when he got near him?

A. Mr. Wallace didn't see him until he turned and was coming back, and he says, Alex Zane, if that is you, take your force and get out of this field.

Q. How far were Wallace and Zane apart when he made that remark?

A. I couldn't tell exactly, but not so very far.

Q. Give the jury some idea of the distance.

A. Probably fifty or sixty yards; I just looked up when I heard him holler at him.

Q. How far were you from Zane?

A. Just across the two lines, and they were narrow lines; couldn't tell exactly how wide they were. Wallace was about half way between me and Zane.

Q. You was about as far from Wallace as Wallace was from Zane?

A. Yes, sir.

Q. Could you hear distinctly?

A. Yes, sir.

Q. Did he say that more than once?

A. Not at that time.

Q. What did he then do?

A. He drove on through and left the field.

Q. Did he come back?

A. I think he did.

Q. How long after?

A. Somewhere in the neighborhood of a half hour or more.

Q. Did he have firearms when he first spoke to Zane?

A. No, sir; if he had they were concealed where I couldn't see them.

Q. When Wallace left the field where was Zane?

A. At the east end of the field.

Q. That would be on the State line about?

A. Yes, sir.

67 Q. When Wallace came back, did he have anything in the way of firearms?

A. Yes, sir; a double-barreled shotgun.

Q. Where did he go to when he left the field?

A. I didn't follow him to see.
Q. Did you see where he went to?
A. He went to the stable and put his team up.
Q. Did you see him after he left the stable?
A. No, sir.
Q. Where was he when you first saw him again after that with the shotgun?
A. On the north side of the field, close to where he done the shooting.
Q. Where was his house from the field?
A. It was on the outside, north of the farm land.
Q. How far, about?
A. From the field it is not very far, beause the field ran right along south of the house probably twenty or twenty-five yards.
Q. How far was he from Zane when you first seen him when he returned with the shotgun?
A. Thirty-five or forty yards; something like that.
Q. Where were you?
A. I was between them at that time—I should think about half way—when I first saw him.
Q. What was Zane doing at that time?
A. He was standing by the post.
Q. Just illustrate his position, using my shoulders?
A. He was just standing like this, facing Wallace, with his right hand on the post and his left hand hanging at his side.
Q. In which direction was Wallace from him?
A. He was north of him.
Q. And you were between Zane and Wallace?
A. That is, when they come into the field.
Q. Was anybody standing by you?
A. Yes, sir; my daughter and Mrs. Wallace and Mr. Lewis.
68 Q. And the other men that came there with Zane were east?
A. Yes, sir.
Q. About how far?
A. About twenty-five yards.
Q. Did Wallace come past you on his way to Zane?
A. Yes, sir.
Q. How close?
A. Probably within six feet.
Q. Did he say anything?
A. Not to me.
Q. Had he spoken before he passed by you?
A. He didn't speak to me.
Q. Did he speak to either of the other persons?
A. He spoke to his wife.
Q. What did he say to her?
A. He says, "Now, mama, girl, I want you to order this man and his force out of this field."
Q. Did he stop?
A. No, sir; not until he was up close. He just come right up and told her that, and she turned around and ordered him out of the field, and

then Mr. Wallace said the same thing to Mr. Zane, "Take your force and get out of this," and he said, "Are you going?" twice, and then he fired.

Q. How far was he from Zane?

A. Fourteen or fifteen feet, as near as I can come at it.

Q. Did Zane say anything?

A. No, sir.

Q. Did he say anything on the occasion when Wallace ordered him out?

A. No, sir; I never heard him say a word.

Q. Where was Zane's other hand at the time he shot?

A. Hanging by his side.

Q. How long did Wallace hesitate or stay when he got to the spot where he fired the shot before he did shoot?

A. Just long enough to tell him what he did tell him.

Q. How was he carrying the gun when he came by you?

A. Kind of down in his hand this way [illustrating].

69 Q. Hold of it with both of his hands?

A. Yes, sir.

Q. And both barrels cocked?

A. Yes, sir.

Q. When he fired what did he do with the gun?

A. He held it in the same position again.

Q. As he fired?

A. When he pulled the trigger he done just as they do when they shoot; I never fired a gun in my life, so I suppose I would be kind of awkward.

Q. What did Zane do when he fired?

A. He turned kind of towards him; looked a little that way; it seemed to me like a long time for a man that was shot, but I suppose it was only a moment, and he turned and walked off.

Q. How far did he go before he fell?

A. About forty yards, as near as we could come at it by stepping.

Q. What did he do then?

A. He fell.

Q. How did he fall?

A. Kind of on his face and side like that—not right straight on his face.

Q. Which way did he go?

A. East; towards his teams.

Q. Did you go to him?

A. No, sir.

Q. Didn't you go up there at all?

A. Not to him; no, sir.

Q. Did you see where the shot struck him?

A. No, sir; only saw where he aimed at.

Q. Where did you go after the shot was fired?

A. Back to my team; I left them standing over on the land where I was plowing.

Q. Did Wallace say anything before he left the field as to where he was going?

A. No, sir.

Q. Was anybody else in the field besides you and him and these other men?

A. His wife was in the field.

Q. Did you hear him say anything about where he was going?

A. No, sir.

70 Q. Has he stated to you at any time where he went to when he left the field?

A. No, sir.

Q. Did he tell you where he got the gun?

A. No, sir; the fact of it is I have not talked with him to amount to anything since he was——

Q. How many men were there altogether, Mr. Denmark, that witnessed this shooting, that could see it?

(Plaintiff objects. Objection overruled.)

A. There were about seven or eight that could see it.

Q. Who were they?

A. Mr. Ead Wallace, Lamont Bailey, Lewis, my daughter, Wallace's wife, myself, and Noah Zane.

Q. Do you mean Eli Wallace?

A. Yes, sir.

Cross-examination by Mr. COWLEY:

Q. About what time in the morning did you go to work?

A. About eight o'clock.

Q. How long had you been at work when you saw Mr. Zane?

A. About three or four minutes.

Q. Where were you when you first saw him?

A. In the west part of the field.

Q. That is in the direction of that chimney?

A. No, sir; he come pretty near as straight as a man could drive; he was ahead of the team.

Q. You know where the gate in that field enters into the barnyard?

A. Yes, sir.

Q. With reference to that gate, was it east or west of it?

A. West of it.

Q. About how far?

A. Probably twenty yards west of that gate.

Q. He was in advance of the teams?

A. Yes, sir.

71 Q. You say you only plowed part way across the field?

A. Yes, sir.

Q. About how large was that field, in your judgment?

A. I don't know whether it was a full half mile or not.

Q. The cultivated land has a fence all around it?

A. Yes, sir.

Q. As he passed by you, did you hear him say anything?

A. No, sir.

Q. How far did he go east before he stopped?

A. He went to the State line.

Q. To the rail fence to the east of the field?

A. Yes, sir.

Q. As he passed by you and Jerry, did you hear Jerry say anything to him?

A. Yes, sir; I heard him say, take your force and get out of the field, if that was him. Wallace had sore eyes, and could not see very well.

Q. Can you give the language Mr. Wallace used?

A. He said, "Alex Zane, if that is your force of men, take them and get out of this field."

Q. Did Mr. Zane make any reply?

A. Not that I heard.

Q. Did Mr. Wallace say anything further?

A. No, sir.

Q. You then went to the east end of the field?

A. Yes, sir.

Q. And that is what you mean when you say you did not plow clear across the field, that when you plowed to the east of that ravine you stopped?

A. Yes, sir.

Q. Were you plowing the same land?

A. No, sir.

Q. Was he farther from where Zane passed?

A. No, sir; he was closer.

Q. About how far was he from Zane as he passed?

A. Somewheres about fifty or sixty yards; don't know exactly.

Q. Zane made no reply, and went on?

No, sir; he made no reply that I heard.

72 Q. How long did Jerry remain in the field before he passed him?

A. He went about half way through it.

Q. To the east or west?

A. West.

Q. When you got to the west end of the land Mr. Zane was at the east end of the field?

A. Yes, sir.

Q. Did you hear the men that were with him singing or saying anything?

A. Not at that time, when I first heard them; some of them were singing a song; I couldn't hear any words. That was what caused me to look up.

Q. After Mr. Zane went to the east of the field he then came back to the west?

A. No; he never came back any further than that post.

Q. But he did come to the post?

A. Yes, sir; Mr. Zane himself did.

Q. Where was Mr. Wallace at that time?

A. He had gone somewhere to get a gun.

Q. You don't know what he had gone for?

A. No, sir.

Q. Where was Noah Zane?

A. He was at another stake, still farther west towards the ravine—about sixteen rods farther.

Q. Did you see Mrs. Wallace in the field then?
A. Yes, sir.
Q. Where was she?
A. She was at that time where I was.
Q. How near to you?
A. Probably as close as you are.
Q. How long was Mr. Zane at that post before Mr. Wallace came back?
A. I wouldn't think he was there over five minutes.
Q. How near did Wallace come to him before he spoke?
A. He come up within a rod.
Q. You were then how far from Zane?
A. I was then between twenty and twenty-five steps.
Q. To the north?
A. Yes, sir.
73 Q. To the west of north or east of north?
A. A little bit to the west.
Q. Where was Lewis?
A. He was there not more than a step from me.
Q. Q. Was he nearer to Zane than you or not?
A. No, sir. He was sitting in his plow handles with his feet in the furrow, and I was standing close by him.
Q. And that was to the east of the line, they were to the north of the line, I mean the line they were running through?
A. Yes, sir.
Q. About how far to the north of the rail fence?
A. Five or six steps, I should think; I never measured it.
Q. What was the first after Jerry came into the field that you heard him say?
A. I heard him say: "Mama, girl, order this man and his force out of here."
Q. How was Mr. Zane standing at that time?
A. With his face to east and his right hand on the post, holding the post.
Q. Then after Jerry had spoken to his wife what was said, if anything, by any person?
A. He says, "Alex Zane take your force and get out of this field."
Q. Did Mr. Zane look towards him then?
A. No, sir; he paid no attention.
Q. He was facing them to the northeast, with his right hand on the post?
A. With his face to the east and his right hand on the post.
Q. Was the left side towards Wallace?
A. Yes, sir.
Q. Did Alex Zane turn towards Wallace?
A. He kind of turned and looked at him when he throwed his gun on him.
Q. Did he turn the body?
A. Just a little, kind of like this [illustrating].
74 Q. Did you see any motion?
A. No, sir; only turned towards him a little.
Q. Did he say anything?

A. No, sir.
Q. Where was Noah Zane at that time?
A. I suppose he was running the distance between the two posts.
Q. Running towards his father and Wallace?
A Yes, sir.
Q. You say he was coming towards Wallace?
A. Yes, sir; I suppose he was; he was there right away after.
Q. When Mr. Wallace walked up there he was about sixteen rods away, and he must have been running, because he was there right away.
Q. Right by Wallace?
A. As quick as the gun was fired he was.
Q. And Wallace was about ten or fifteen feet from the father?
A. Yes, sir.
Q. After Wallace fired, what did he do?
A. He stood there and held his gun.
Q. What was done by any of the parties, if anything?
A. Noah Zane about that time stuck Wallace in the back with a knife.
Q. Anything else?
A. No, sir.
Q. Then what was done?
A. Wallace throwed the gun on him then.
Q. What did Zane do?
A. He was falling about that time.
Q. After the gun was fired, how long did Zane stand there?
A. Just a moment.
Q. Then he started and walked away?
A. Yes, sir.
Q. About forty steps?
A. Yes, sir.
Q. And fell?
A. Yes, sir.
Q. Did you hear anything more since then?
75 A. I heard Mrs. Wallace say, "Shoot him, too," meaning the boy.
Q. Was anything else said?
A. The next thing the boy turned back on him, of course, with a hatchet or something, but Mr. Wallace throwed the gun on him.
Q. Do you know whether Mr. Zane had any arms or anything on his person or not?
A. I saw the boy go his father and get the hatchet.
Q. Wasn't it called an Indian tomahawk?
A. That was what they called it.
Q. The boy run and took that from his father?
A. Yes, sir.
Q. You are not able to state where it was on the person of the father?
A. No, sir.

Redirect examination by W. C. PERRY:

Q. Mr. Denmark, the boy Noah, as I understand your statement, as soon as Wallace shot his father, ran up to Wallace and stabbed him with a pocket knife?
A. As soon as he could get there.
Q. What sort of a knife was it?

A. I never saw the knife; it was covered with his hand. I could see nothing only just the blade. At first I supposed he had struck him with his fist.

Q. After the boy did that, what did Wallace do?

A. Wallace throwed the gun on him.

Q. Did he pull the trigger?

A. I suppose so, for he said the damned thing snapped.

Q. Did he say anything else about the boy?

A. Not that I remember.

Q. The counsel talked about a tomahawk. It may be a tomahawk down there, but here it is a hatchet?

A. It looked to me like one of these hatchets I saw up north in the stores.

76 Q. A hammer on one side and a hatchet on the other?

A. Yes, sir.

NOAH ZANE, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Are you related to Alexander Zane?

A. Yes, sir.

Q. What relation was you to him?

A. I am his son.

Q. How old are you, Noah?

A. I am fifteen years old.

Q. Do you know how old your father was?

A. I guess he was fifty two or three.

Q. Is your mother alive?

A. Yes, sir.

Q. Was your father an Indian or a white man?

A. Indian.

Q. How much Indian?

A. I don't know.

Q. Is your mother an Indian?

A. No, sir.

Q. A white woman?

A. Yes, sir.

Q. What tribe did your father belong to?

A. Wyandotte.

Q. Do you know Jerry Wallace?

A. Yes, sir.

Q. Were you present the morning he shot your father?

A. Yes, sir.

Q. Did you go down there with your father?

A. Yes, sir.

Q. Who went along with you and your father?

A. Ead Wallace and John Lamont.

Q. Anybody else?

A. Will Bailey.

Q. What time did you get down there to the place where you

77 were going to build the fence?

A. I don't know just what time it was.
Q. How long had you had your breakfast?
A. About a half hour, I guess.
Q. Where was Jerry Wallace when you got down to that line where you were going to run the fence?
A. In the field.
Q. Did you see anybody else in the field?
A. Yes, sir; another man.
Q. Did you know that man?
A. It was Mr. Denmark, and there was another man.
Q. Who?
A. It was Lewis.
Q. Did Wallace say anything to your father?
A. He ordered him out of the field.
Q. Can you give his words? Do you remember the words he used?
A. No, sir.
Q. But he ordered him out of the field?
A. Yes, sir.
Q. What did your father say?
A. Nothing.
Q. Where did you go to after Wallace ordered you out of the field?
A. He went on up to the other end of the field.
Q. That would be the east end, near the State line?
A. Yes, sir.
Q. Where did Wallace go to?
A. He went to the house.
Q. Did he come back?
A. Yes, sir.
Q. About how long was he gone?
A. About half an hour.
Q. When he came back did he have anything with him?
A. He had a gun.
Q. What kind of a gun?
A. A shotgun.
Q. Where was he when you first saw him when he come back with the shotgun?
A. On the inside of the field.
Q. How far from his house?
A. I don't know just how far it was.
78 Q. Was it a long distance or a short distance?
A. Short distance.
Q. How was he carrying the gun, Noah, when you first saw him?
A. He was carrying it along this way [illustrating].
Q. How far was he from your father when you first saw him with the gun?
A. About thirty steps, I guess.
Q. Where were you at that time?
A. I was down at the other end towards the ravine.
Q. Where were you from Eli Wallace?
A. I was away down below him.
Q. You were west of him, were you?

A. Yes, sir.
Q. And your father was west of you?
A. No; east of me.
Q. And Eli Wallace and Bailey and Lamont were still further east, were they?
A. Yes, sir.
Q. Now, this is east out here. If Mr. Cowley was you, you would be the farthest east of all of them?
A. They were west of me.
Q. Now, then, next to you was your father east?
A. Yes, sir.
Q. How far apart were you?
A. I don't know.
Q. As far as across the room here?
A. Yes; about twice as far.
Q. Now, then, Wallace came from the north, I understand you to say?
A. Yes, sir.
Q. Eli Wallace, Lamont, and Bailey were still further east?
A. Yes, sir.
Q. Where were Denmark and Lewis?
A. Over further.
Q. How far was Wallace from Denmark and Lewis when you first saw him when he came back with the gun?
A. He was along this side, near them.
Q. Where was Mrs. Wallace? Did you see her?
A. She was there with her husband.
Q. Was there anybody else there?
79 A. No, sir; I don't think there was.
Q. Did you hear Jerry Wallace say anything to your father?
A. No, sir.
Q. What was the first thing you saw him do, if anything?
A. He just throwed the gun down on him.
Q. What were you doing then?
A. I was going up there.
Q. Where were you when the shot was fired?
A. I was pretty close to him.
Q. To who?
A. Jerry.
Q. Did you hear him say anything at all?
A. No, sir.
Q. Didn't you hear your father say anything?
A. No, sir.
Q. Didn't he stop—how far was he from your father when he shot him?
A. About ten steps, I guess.
Q. Did your father say anything?
A. No, sir.
Q. Did he do anything?
A. No, sir.
Q. What did you do, Noah?
A. I stuck him with a knife.

Q. What did he do?
A. He throwed the gun down on me and snapped it.
Q. How far—where did your father go after he was shot?
A. He just walked off a piece, there.
Q. Did you go to him?
A. Yes, sir.
Q. Did he say anything?
A. No, sir.
Q. Was he dead when you got to him?
A. Yes, sir.
Q. Where did the shot strike him?
A. In the breast.
Q. Did your father have any guns or weapons with him that morning?
A. He had a tomahawk.
Q. What is a tomahawk?
A. A little hatchet.
Q. With a hammer on one side and a hatchet on the other?
A. Yes, sir.
Q. What had he been using that for?
80 A. Cutting posts with it.
Q. Where was it when you got to him?
A. In his hip pocket.
Q. Did you take it out of his hip pocket?
A. Yes, sir.
Q. Did he have any pistol?
A. No, sir.
Q. Did you?
A. No, sir.
Q. What kind of a knife was that you stuck Jerry with?
A. Just a two-blade knife.
Q. Have you it with you?
A. No, sir.
Q. Was it bigger than that [showing witness a knife]?
A. Yes; I believe it was a little bit bigger than that.
Q. How long was the blade?
A. The blade was about as long as that.
Q. It was the knife you usually carried around in your pocket with you?
A. Yes, sir.
Q. What did you do with that knife? Why have you not got it here?
A. I gave it to someone at the preliminary trial at Baxter Springs.
Q. And you have not seen it since?
A. No, sir.

Cross-examination by Mr. COWLEY:

Q. What is your age, Noah?
A. I am fifteen.
Q. Is the knife anything like this or as large as that?
A. It was about as long as the blade.
Q. The blade was nothing the shape of that?
A. No, sir.
Q. Would you think it was about that long?
A. Yes, sir.

Q. You had it at the preliminary examination at Baxter Springs?
A. Yes, sir.
Q. You were there and upon the witness stand?
A. Yes, sir.
Q. And you had the knife at the preliminary examination?
A. Yes, sir.
81 Q. You gave it to someone there?
A. Yes, sir.
Q. Do you know to whom you gave it?
A. No, sir.
Q. Have you seen it since that time?
A. No, sir.
Q. You think that morning it was about a half hour after breakfast when you went to the field?
A. Yes, sir.
Q. Mr. Wallace—Mr. Eli Wallace—and yourself and your pa and John Lamont went to the field with you?
A. Yes, sir.
Q. Before you went into the field you went into the timber and got some posts that morning?
A. Yes, sir.
Q. Then you went down—you know where that smoke chimney in the field is, do you?
A. Yes, sir.
Q. You went in the field not far from that, did you?
A. Yes, sir.
Q. Then you went to the Missouri line?
A. Yes, sir.
Q. When you passed Mr. Wallace, what was he doing?
A. Plowing.
Q. About how far were you from him when you passed him?
A. I don't know how far.
Q. Just look at the farther building there, was you as far as that?
A. No, sir.
Q. Were you as far as across the street to that brick building you can see there [referring to a building across the street from court room]?
A. Yes, sir.
Q. Your pa went to the east end and then back, and you went with him?
A. Yes, sir.
Q. You went to a post a little farther west than he did?
A. Yes, sir.
Q. How was he standing with the post when Wallace come from the house?
A. His right hand was on the post.
82 Q. You saw Mr. Wallace when he came from the house?
A. I don't know where he came from.
Q. Did you see him enter the house?
A. No, sir; I never—I just saw him when he took his team out.
Q. Don't know whether he entered the house or not?
A. No, sir.

Q. When he came towards your pa then, and you saw him having a gun, you went towards Jerry?
A. Yes, sir.
Q. And you were by Jerry when he fired the shot?
A. Yes, sir.

83 W. P. BAILEY, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. PERRY:

Q. Where is your home, Mr. Bailey?
A. Wyandotte Reservation.
Q. How long have you lived there?
A. Since February.
Q. Were you acquainted with Alexander Zane during his lifetime?
A. Yes, sir.
Q. How long had you known him prior to his death?
A. Something over fifteen years.
Q. What aged man was he?
A. Fifty and upwards.
Q. Do you know where he spent his life usually?
A. Ever since I knew him he lived on a farm and was conducting a farm.
Q. Did he belong to the Wyandotte tribe of Indians?
A. Yes, sir.
Q. If you know, how much Indian blood did he have in his veins?
A. I don't know.
Q. What was his appearance as to being white or red?
A. He was a fair, sandy-complected man.
Q. My intention was to inquire whether he showed he was Indian in the color of his skin.
A. Yes; he showed some Indian, in his ways more than his looks.
Q. What tribe was he associated with?
A. Wyandottes.
Q. Do you know Jerry Wallace, the defendant?
A. Yes, sir; I have seen him a number of times.
Q. How long have you known him?
A. It has been about four years, I think, since I first got acquainted with him.
Q. During that time where has he been living?
A. I don't know where he had been all the time he had been living there on the place. He lived there until this 7th of March for a
84 year or two; maybe three.
Q. Did you go down to the place where this difficulty occurred on the morning of the 7th with Zane?
A. Yes, sir.
Q. Where did you start from?
A. From Zane's house, or near the house.
Q. Where were you living at that time?
A. West of Zane's about a quarter of a mile; maybe a little farther.
Q. What time in the morning did you go to Zane's house?

A. I wouldn't be positive about the time, but it was right away after breakfast; somewhere between six and seven o'clock.

Q. Was Ead Wallace there at that time?

A. Yes, sir.

Q. He had already arrived?

A. Yes, sir.

Q. When you left Zane's house who was in the party?

A. Zane, Ead Wallace, Noah Zane, and myself.

Q. Where did you go to from the house?

A. Over south to his farm, where some posts had been made, and we loaded them and took them up there with us.

Q. What time did you say you arrived at that place where you meant to put up this fence?

A. About eight o'clock, I would judge.

Q. Where did Lamont join you?

A. After we had got the posts loaded and had started to the field we met Lamont.

Q. So there were five of you when you went to this line where you intended to put the fence; that is, Noah Zane, Ead Wallace, Baily, yourself, and Lamont?

A. Yes, sir.

Q. After you got there what was the first thing that occurred, so far as the defendant, Jerry Wallace, was concerned?

A. He ordered Mr. Zane out of the field. I don't mind just what the words were that he spoke first, but the next time he spoke and said, "Alex Zane, if this is your force, take it and get out of here immediately."

85

Q. How far apart were Zane and Wallace at that time?

A. Fifty yards, I think.

Q. What, if anything, did Zane say at that remark?

A. Nothing at all.

Q. What arms, if any, did you folks have with you?

A. Nothing that I know of but a chopping ax.

Q. What did you take that for?

A. Chop posts with.

Q. Well, what I mean is, did you have any firearms, pistols, or anything of that character?

A. Nothing of that kind.

Q. What did you go down there for?

A. To build a fence.

Q. After these remarks by the defendant to Zane, where did you and your party go?

A. We went right on east to the State line.

Q. What became of the defendant, or where did he go?

A. He had taken his team loose from the plough and went towards the house.

Q. At the first time that the defendant ordered Zane to take his force and get out of there did he, the defendant, have any firearms?

A. Not that I saw.

Q. After he left the field and put his team up at the barn, as you stated, how long was it before he reappeared again?

A. He came back in about half an hour.

Q. When he came back how did he come, foot or horseback?

A. He came afoot, with his shotgun in his hand.

Q. He was holding his gun kind of this way [illustrating] and was walking very fast when I first saw him.

Q. Where was he when you first saw him? Now, just for the sake of the exact situation that the parties assumed, we will say this is the east and that is north; just tell the jury where you all were.

A. That wall there is the State line, and Ead Wallace and myself
86 and John Lamont was up near that line and Alex Zane was west of us 100 yards, maybe, or more; I never measured the distance; and Jerry climb the fence on the north side, I suppose; he was right at the fence when I first saw him coming back with the gun.

Q. Where was Wallace's house from there?

A. It was north and a little west of where Zane was standing.

Q. About how far?

A. Well, it was something near a 100 yards, I suppose.

Q. Where was the boy, Noah Zane?

A. He was still west of his father, about thirty yards, I guess.

Q. When you first saw Jerry Wallace who was there?

A. There was Mr. Denmark, Mr. Lewis, so they proved to be, I didn't know them at the time though, and Mrs. Wallace and Miss Emma Denmark.

Q. When the defendant, Wallace, came back with the shotgun did you hear him say anything?

A. No, sir.

Q. Tell the jury from the time when you first saw him where he actually was and what he did.

A. As I said before, he was walking fast when I seen him, and he walked up near Zane, within fifteen feet of him, I suppose, and drawed his gun just that way [illustrating], holding his hands as men usually do when firing a gun, maybe a second, possibly two seconds, and then he fired. I didn't hear any words passed at all.

Q. What was Zane doing when Wallace approached with the gun the way you described?

A. He was standing by a post that we had stuck in the ground to run our fence by, holding to it with his right hand.

Q. What was he doing with his left hand?

A. It was hanging by his left side.

Q. Did Zane on that morning have any arms of any kind?

A. I saw nothing about him.

Q. After Wallace fired the shot what did Zane do?

87 A. Zane turned with his face towards the east and put his right hand this way [illustrating] on his left breast and stooped over and come exactly towards us, bearing a little bit to the south of us, and went about thirty steps and fell.

Q. What did you do?

A. I went down to him.

Q. Did he speak to you?

A. No, sir.

Q. Did he breathe?
A. I never saw him breath'.
Q. Was he dead?
A. I would call him dead.
Q. Well, was he dead?
A. Yes; he was dead.
Q. Where did the shot strike him?
A. In the left breast; right here [illustrating, putting hand over heart].
Q. Did Wallace fire more than once?
A. No, sir.
Q. Where did Wallace go after he had fired the shot?
A. He walked—immediately after he fired the shot he walked back to where his woman and these other parties were.
Q. Where was Noah at this time?
A. He must have been right close to Wallace, but I didn't see him until after the gun was fired, and I seen him strike Wallace in the back.
Q. What did Wallace do after the boy struck him?
A. He turned towards the boy and raised the gun on him—raised it in the position a man usually does when he goes to shoot with a gun.
Q. What did the boy then do?
A. He run away from Wallace when he drew the gun.
Q. There has been something said here about a hatchet or tomahawk which Alex Zane had. Did you see it?
A. I seen the boy go to him and get something, and after I got down to where the boy was I saw a hatchet in his hand.
Q. Well, what was it, tomahawk or hatchet?
A. Well, sir, if I ever saw a tomahawk I don't know it; this was what I called a small hatchet; it had a bowl on one end and a bit on
88 the other, and had a handle like a hatchet; it looked like one, and a half——
Q. Did Zane have this hatchet in his hand at any time when this shooting took place?
A. No, sir.
Q. I guess you stated—but I don't remember—the distance between you and Zane when Wallace fired the shot?
A. Well, it was about a hundred yards, I should judge, or more; may have been one hundred and fifty; I have never measured the land.
Q. Where was Wallace when he fired this shot?
A. In the Wyandotte Reservation.
Q. Where was Zane?
A. He was in the Wyandotte Reservation.
Q. And the date of it was what?
A. March 7th.
Q. What year?
A. 1895.

Cross-examination by Mr. CROWLEY:

Q. You say you have been living in the Wyandotte Reservation since February of this year?
A. Yes, sir.
Q. Before that where did you live?
A. I have been in the Wyandotte Reservation a year ago last May.

Q. Along about the 15th of May, 1894?
A. Yes, sir.
Q. How close to Mr. Wallace had you been living before May 15th, 1894?
Q. I have not lived close to Mr. Wallace? I have lived in Kansas for two years.
Q. Where?
A. In Labette County, near Edna.
Q. Near the D. M. & A. R. R.?
A. Yes, sir; about a mile and a half.
Q. Had you ever lived prior to May 15th in the Indian Reservation?
A. Yes, sir.
Q. When was it?
89 A. I lived down there—I believe it was '91; sometime in 1891.
Q. In the summer of '91, were you acquainted with Mr. Zane?
A. Yes, sir.
Q. Were you acquainted with Mr. Wallace?
A. Yes, sir; I got acquainted with him that summer.
Q. Where was Wallace living at that time?
A. At Frank Wallace's, his brother's.
Q. When you moved into the Indian reservation in 1894, where was the defendant, Jerry Wallace, living at that time?
A. Right in that house where the difficulty took place.
Q. You lived about how far from him?
A. It was one and a half miles, I guess.
Q. Then in February you moved up closer to the place?
A. No; in May, 1894, I lived, I guess—I worked for a man near Swanee Switch, that was in '94—a mile from there.
Q. Then in February, 1895, you moved from this Swanee Switch to within a half mile from Jerry Wallace?
A. Yes, sir.
Q. When you were at Swanee Switch, Jerry Wallace lived near on this same place?
A. Yes, sir.
Q. Did you ever see him cultivating this land in 1894?
A. I don't believe I ever did.
Q. You were not there very much in 1894?
A. Not very much. I saw a family by the name of Workman working it.
Q. It was on the Frisco Road?
A. Yes, sir.
Q. The morning of March 7th you went over to Zanes'; when you reached there you found a man by the name of Eli Wallace, Noah Zane, and Alex Zane?
A. Yes, sir.
Q. Did you ask the time over there?
A. No, sir.
Q. After reaching there you took a lot of posts and went to the field and then to the timber?
90 A. Yes, sir; we went to the timber, then to the field.
Q. Whereabouts on your way did you meet Lamont?

A. Between where we loaded the posts and the field.
Q. Was he driving a team or was he afoot?
A. He was afoot.
Q. He joined your number?
A. Yes, sir.
Q. You then entered the field upon the west side?
A. We entered the field at the west end of that disputed line, where the fence crosses that line.
Q. A little north of the smokestack or chimney?
A. Yes, sir; a little north and a little west.
Q. You passed along through the field to the east side of it on the Missouri line?
A. Yes, sir.
Q. On the way were any of your number singing?
A. No, sir; I think not. I wouldn't be positive about it.
Q. Have you any recollection of that fact?
A. No, sir.
Q. You are not able to say positive whether there was any singing or not?
A. No, sir.
Q. You then passed in towards Jerry's house, near the house?
A. Yes, sir; as we went east.
Q. About what distance from the house south of it did you pass to the field?
A. About one hundred yards, I would judge.
Q. Jerry at that time was to the south of where you were passing along?
A. Yes, sir.
Q. The distance, as you recollect it, was what?
A. Why, I don't exactly know; but it must have been about forty yards.
Q. Was Lewis—you saw Lewis that morning?
A. Yes, sir.
Q. Were you acquainted with him at that time?
A. No, sir.
Q. You learned afterwards?
A. Yes, sir.
Q. He was not in the field as you passed along?
A. No, sir.
Q. Have you no recollection of seeing him in the field that morning?
A. No, sir; not as we passed Wallace.

Q. How soon after you passed Wallace was your attention called
91 to Lewis being in the field?

A. Must have been ten or fifteen minutes after we passed Wallace.
Q. Then you saw him in line as you were driving through?
A. Yes, sir.
Q. And that was between the line you had passed over and the north fence?
A. Yes, sir.
Q. Did you see Denmark there?
A. Yes, sir; I did.

Q. Was he to the north or south?
A. South.
Q. About what distance was he farther south than Mr. Wallace?
A. I don't know how far.
Q. Your best judgment as to the distance?
A. Sixty or seventy yards, I guess.
Q. Did you know at that time for whom Denmark was working?
A. No, sir; I did not.
Q. He was busy ploughing?
A. Yes, sir.
Q. Who else did you see in the field?
A. I saw Mrs. Wallace.
Q. As you passed by Wallace did you see Mrs. Wallace?
A. Yes, sir.
Q. Who else did you see?
A. I didn't see no one only just what was with us.
Q. As I understood you, as you passed Wallace you saw Denmark, Wallace, and Mrs. Wallace, and the number that were with you were all that you remember seeing in the field.
A. At that time; yes, sir.
Q. As you passed Wallace he spoke; what did he say?
A. I don't know exactly the words he said when he first spoke to Zane; then he waited just a minute and hollered again and said, "Alex Zane, if this is your force, take it and get out of here immediately."
Q. The ground over which you passed had been ploughed this year?
A. Yes, sir.
Q. What reply did Zane make to Wallace?
A. None.
92 Q. Did any of you make any reply?
A. No, sir.
Q. Was he working?
A. He was working.
Q. In the rear or advance?
A. Advance.
Q. Where was Noah?
A. He was walking, driving the team.
Q. Where was you?
A. Walking kind of between the two wagons.
Q. You then went about what distance from where Wallace spoke to you before you reached the fence upon the east side?
A. Something like one hundred and fifty yards.
Q. May be more or less than that?
A. Yes, sir; it may be.
Q. But you went to the Missouri line fence?
A. Yes, sir.
Q. Where was Wallace during the time you were passing that fence?
A. He was south of us and drove on west. We were going east, and he drove on west. He was ploughing, and he plowed on until he got to that little ravine, and then he took his team out and went towards the house or barn.

Q. The ravine you spoke of runs almost north and south as you went to the house, bearing a little west of the house, and then it was zigzag through the field?

A. Yes, sir.

Q. Did you notice where Wallace went to then?

A. He took his team loose from the plow and went through that gate that went to the house.

Q. That was to the east and south of the well?

A. Yes, sir.

Q. Did you notice then where he went to?

A. No, sir.

Q. At the time he passed through the gate, going to the house and barn and returned to the field, you are not able to say where he was?

A. No, sir.

Q. During the time that intervened between his going to the house and returning what were you and your number doing?

A. We were driving posts. There was Ead Wallace and myself setting and driving posts, and Zane was west of us setting up a stake for
93 us to run by.

Q. And you setting the posts over and across the plowed ground?

A. Yes, sir; we were setting the posts where the ground had been plowed.

Q. And the ground was plowed to the north and south?

A. Yes, sir; both ways.

Q. Were you drinking any that morning, or any of your crowd?

A. A little bit; yes, sir.

Q. When Wallace returned, did you notice at what point he entered the field?

A. I didn't see him enter the field, but he must have entered near the north of where Zane was standing.

Q. Did you hear him say anything?

A. No, sir.

Q. Did you hear any words spoken?

A. Nary one.

Q. Where was Zane standing and what was his position?

A. He was standing by the post, with his right hand on the post.

Q. Was the right hand elevated above the level of the body?

A. It was possibly raised a little.

Q. The left hand, where was that?

A. Hanging by his side.

Q. How was Zane dressed?

A. He had a coat and vest on—why, he just had on his everyday clothes, I guess.

Q. Do you know whether he had any weapons of any kind in his clothing?

A. No, sir; I don't.

Q. Do you know if any weapons were taken off of him after the shooting?

A. I wouldn't be positive whether that hatchet was taken off of him or not, but the boy went to him and got the hatchet, and when I got there the boy had it in his hand.

Q. What motion, if any, did Zane make while standing at the post?

A. I never saw any motion, only he dropped his head like that [illustrating] when Wallace first pointed the gun at him like that, and
94 then he dropped his head a little and then Wallace dropped the gun a little and fired.

Q. Where was his left hand at that time?

A. In this position [illustrating] by his side.

Q. Was it towards the breast or away from it?

A. I don't know; he didn't raise it, it was down.

Q. Was there any words spoken?

A. I never heard any.

Q. After that, did you hear any words?

A. Why, yes; I heard words—I heard Mr. Wallace; he ordered us to take the posts and get out of the field.

Q. You took the posts and went out, or did you unload the posts there?

A. We unloaded some out of the wagon that had the box on. He was hollering at us to take the posts and get out of there, and I went down there and asked him if we might unload that wagon that had the box on, so we could take the man out, and he said we could.

Q. Did you make any examination of the wound inflicted on the person of Mr. Zane?

A. No, sir; only I saw where he was shot.

Q. But as to the examination of the wound, you made none.

A. No, sir.

Q. I will ask you—you say that you saw Jerry as he drove to the west end of the ravine, you were then at the east end—how many posts had you driven before you noticed Jerry go from the field?

(Plaintiff objects, as it is incompetent. Objection overruled.)

A. I don't know how many posts we drove.

Q. When he came back how many posts had been driven?

Judge WILLIAMS. That comes within the objection.

Q. What length of time did it take to drive a post?

Q. About what length of time did it take to drive a post?

(Plaintiff objects. Objection overruled.)

A. I don't know.

95 Q. What were you driving them with?

(Plaintiff objects. Objection overruled.)

A. With a maul made out of a hickory sapling.

Q. What was the condition of the atmosphere that morning?

A. It was a little foggy.

Q. This field lays in a kind of a valley?

A. Yes, sir.

Q. There are three valleys jutting in together, are they not—one from the east, one from the west and a little north, and one from the south west; they center in that field, do they not?

A. I mind of but two valleys there, one coming down from the east out of Missouri and one coming down from the south from the Seneca Reservation, the one on the south joining the one from the east.

Q. There is a great deal of brush there?

A. Yes, sir.

Q. East of the field?

This field—this Roak field east of this field of Wallaces.

Q. You say it was rather a foggy morning?

A. Yes, sir; somewhat foggy when we first started out that morning, but it cleared up after awhile.

96 SAMUEL ROBINSON, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Mr. Robinson, you live where?

A. Wyandotte Reservation.

Q. Your name is Samuel?

A. Yes, sir.

Q. Do you belong to the tribe?

A. No, sir.

Q. Did you know Alexander Zane when he was alive?

A. Yes, sir.

Q. Do you know the defendant?

A. Yes; I knew him when I seen him.

Q. How long have you known him?

A. I think it has been two years and eight months since I first met him to know him.

Q. Did you meet him one time in Joplin?

A. Yes, sir; that was the first time I ever met him to know him.

Q. How far is Joplin from the Wyandotte Reservation?

A. I think it is about forty miles or more from where I live to Joplin.

Q. Joplin is in Missouri?

A. Yes, sir.

Q. And the Wyandotte Reservation somewhat west of there?

A. Yes, sir.

Q. When was it you saw Wallace here, the defendant, in Joplin?

A. I think it was in November, 1893.

Q. Did he say anything about the deceased, Alex Zane, at that time?

A. Yes, sir; he and I had a little talk.

Q. Who was there besides you and him?

A. There was a man by the name of Fowler that I was acquainted with, and Doc Sargent.

Q. What did Jerry Wallace say about Alex Zane?

A. Fowler gave me an introduction to Wallace and Doc Sargent. They lived in West Town and I lived in East Town, and he introduced me to them, and then we tended to the mules and went back to breakfast, and Fowler said, "He has married your friend's daughter;"

97 and when I went back and got to talking to him and I said, "You married Alex Zane's daughter," and he said "Yes;" and I said, "Alex Zane was a friend of mine;" and he said, "He was a grand old rascal;" and he said, "I come very near killing him once, and if he fools with me much I will kill him;" and so I walked off, for I saw there was bad blood there, and I thought I had better not say much.

Q. How long have you known Alex Zane?

A. I think about eight years ago I got acquainted with him.

Cross-examination by Mr. COWLEY:

Q. That was in the month of November, 1893?

A. I think it was.

Q. You had been introduced to Jerry by Fowler?

A. Yes, sir.

Q. What is his given name?

A. Robert.

Q. You were living at that time in East Town?

A. Yes, sir; and they were in the West Town, at what they called the Red Front Stable.

Q. You went over to West Town?

A. Yes, sir; the next morning.

Q. You were introduced to Jerry?

A. Yes, sir; and to Doc Sargent.

Q. Did you have any conversation with Sargent?

A. Yes; some.

Q. Was the conversation with Jerry or Sargent?

A. Well, I had some conversation with both of them, and I had been talking to Jerry by myself, too.

Q. Had you been talking to Sargent before that?

A. Yes; I had spoken to Sargent and had some talk with him.

Q. When you were speaking to Jerry what did you say?

A. When I spoke to him I said, "You married Alex Zane's daughter?" and he said, "Yes," and I said he was an old friend of mine.

Q. Who was present besides Jerry at that time?

98 A. I don't know whether Sargent and Fowler were present at that time or not.

Q. Then what did you and Jerry say?

A. I told him I was a friend of his father-in-law, and he said that I was a friend to a grand old rascal, and that he come very near killing him once, and if he fooled with him much he would kill him.

Q. When did you tell this conversation first?

A. I don't recollect.

Q. To whom?

I told it to Fowler—that Jerry and Zane were not good friends.

Q. That was all you told them that day?

A. Yes, sir.

Q. When did you tell the conversation that you have just narrated as having taken place between you and Jerry?

A. One day in Seneca, not long ago.

Q. To whom did you tell it?

A. I told it to man that they said his name was Houston.

Q. Any body else?

A. There were several standing around that heard it if they listened.

Q. That was all that took place between you and Jerry?

A. That was all that took place between us then.

Q. What Houston was it?

A. I don't know.

Q. Is it the man that was here?

A. Yes, sir; he is here.

Thereupon the plaintiff rests its case.

99 The defendant then, in order to maintain the issues upon his part, introduced the following testimony:

100 SAMUEL COLLINS, being duly sworn on the part of the defendant to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Direct-examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Collins?
A. I live in Newton County, Missouri.
Q. How long have you lived there?
A. Five years the 13th of November next.
Q. Do you know Jerry Wallace, the defendant in this case?
A. Yes, sir.
Q. How long?
A. Ever since I have been in the county.
Q. Where do you live with reference to the premises and residence of Jerry Wallace?
A. His land and mine corners together. My west line is the Territory line, and it joins up to where their land joins to it—at the northeast corner of their land that joins to mine.
Q. About how far away is your house from his?
A. I suppose about one hundred and twenty rods.
Q. Where did Zane live on March 7th with reference to Wallace?
A. He lived right on west on the same valley that Mr. Wallace lives on.
Q. Were you present on the morning of March 7th on or near the premises of Jerry Wallace when this shooting took place?
A. Yes, sir; I come along about 8 o'clock; I happened to be there.
Q. Anyone with you?
A. Mr. Houston.
Q. Who is he?
A. A neighbor of mine.
Q. And you and he came over there together?
A. Yes, sir.
Q. When you get down the hill do you strike this land just at the foot of the hill from the north—the cultivated land, I mean?

101 A. No; there is a draw between my place and Mr. Wallace's, and there is a clump of brush, and there is no cultivated land until you strike the valley.

Q. And when you come out of the brush you are right close to the cultivated land?
A. Yes, sir; right at the foot of the hill—right next to the hill.
Q. The timber lays north?
A. Yes, sir.
Q. When you first went in there on the morning of the 7th, what was your attention first called to?
A. Well, I went over there to borrow his wagon——
Q. But I say, when you first went over there what was your attention first called to; was your attention called to anything that was occurring?
A. Yes, sir; there was singing and hollering in the valley.
Q. What direction was that from you?

A. South.

Q. What did you do, if anything?

A. We walked up on the raise to see what was going on, as it was a little uncommon to hear such a noise, and so we just went up on this little hill so we could see.

Q. Who did you see there?

A. I saw Ead Wallace, Bailey, and Lamont.

Q. Where were they and what were they doing?

A. They were driving posts and setting them; I wouldn't be positive whether Bailey was driving or not, but they were driving the posts in the ground.

Q. Who else did you see in that field besides Wallace, Bailey, and Lamont?

A. Mr. Lewis, Denmark, and Alex Zane.

Q. Who else?

A. I saw Jerry Wallace and his wife there.

Q. At what time did you see Wallace?

A. Just a little bit after I saw these men setting posts.

Q. Where was he?

A. He was inside of his field when I first saw him.

102 Q. What was he doing?

A. He was coming towards Alex Zane from his house, or from towards his house.

Q. Well, go ahead and tell the jury what you saw.

A. He just walked up within a few steps of Zane and said, "Alex Zane I want you to take your mob and get off of these premises;" and if Zane said anything I never heard it; and he asked him if he was going to go; and during this time Mr. Zane had his left hand on the post and was standing in about this shape [illustrating], with his left hand on the post; and he said, "Are you going?" the second time and fired the gun; when the gun fired he took his left hand off of the post and *and* put both his hands on his breast and started off in a stooped position; they all said he run, but he didn't; he just staggered from that post.

Q. At the moment just before the shot was fired, where was young Zane?

A. I never saw young Zane until he came to his father and took the hatchet out of his father's bosom.

Q. He was standing, you say, with his left hand on the post; what direction was his body?

A. On the southeast side of the post in this position [illustrating], and Mr. Wallace was standing in that direction [indicating]. That was just about the way he was standing.

Q. You say you have known Jerry Wallace for three years and over?

A. Yes, sir; over three years; we have been neighbors there for three years.

Q. Are you acquainted with his character as a peaceable man, only his trouble with Alex Zane?

A. He never had any trouble that I know of with any of the rest of the neighbors around.

Q. Well, what was his character as a peaceable man?

A. He was a peaceable man ever since I went there and have been there with him; was quite a good neighbor; don't want any
103 better than him since we have lived there together.

Q. Are you acquainted with Alex Zane's character for quarrelsomeness?

A. Yes, sir—well, not to say I do myself, only what I have heard from others is all I know about it.

Q. I will ask you what that character and reputation was in the community for quarrelsomeness?

(Plaintiff objects. Objection sustained. Excepted to by defendant.)

Q. Mr. Collins, have you ever had any conversation with Mr. Zane about Wallace?

A. Yes, sir; I have had a good deal of talk with him.

Q. When did you have the last one prior to March 7th with Alex Zane about Wallace?

A. He rode from town with me in a buggy in February or January, I don't know which; anyhow, it was close to March.

Q. Where at?

A. Coming from Seneca home; he rode down with me until we come to where the road turns off to go to his house.

Q. In his conversation with you, did he make any threats towards Jerry Wallace?

(Plaintiff objects, it is incompetent now. Objection sustained. Defendant excepts.)

Cross-examination by W. C. PERRY:

Q. To whom did you speak that morning in that field, if anyboby?

A. I didn't speak to anybody.

Q. Did you have any conversation with Ead Wallace, or Lamont, or Bailey, or Denmark, or Lewis, or Noah Zane?

A. Not that day I didn't.

Q. Who did you first tell that you were there?

A. I didn't tell anybody; I just come right on down to the house
104 and saw Jerry Wallace at the back of the building and asked him what was the matter with his back, for there was blood running down his shoulder.

Q. Now, you didn't say a word after Jerry Wallace shot?

A. No, sir.

Q. Who did you first see and tell of the shooting?

A. Nobody that I know of.

Q. This is the first time that you ever told it?

JUDGE. He asked you who you first told it to.

A. I don't know who I first told it to.

Q. Were you at the preliminary examination at Baxter Springs?

A. Yes, sir.

Q. Were you a witness there?

A. Yes, sir.

Q. Had you ever told it to anyone until that time that you saw the shooting?

A. I talked to my neighbors about it; yes, sir.

Q. But you never did speak to anybody who was there; you never did speak to any of the men who were there in the field?

A. No, sir.
Q. Who is this man Houston?
A. He is one of my neighbors.
Q. How long have you lived down there?
A. Five years.
Q. How long have you known Alex Zane?
A. Ever since I have been there.
Q. Didn't know him before?
A. No, sir.
Q. Didn't you have your curiosity aroused enough to look at his dead body after he was shot?
A. I never went near him.
Q. He was a neighbor of yours?
A. I have had dealings with him.
Q. Well, he lived near you?
A. About two and a half miles, I suppose.
Q. Where were you when the shooting took place?
A. About seven-five yards; right on the road above the valley.
Q. North?
A. Yes, sir; north.
105 Q. That would throw you up against Wallace's house?
A. Little east of the house, on the same little ridge his house stands on.
Q. How far east?
A. Eighty or ninety yards east.
Q. Where did you first see him with a shotgun?
A. I sold it to him.
Q. Where did he get it that morning?
A. I couldn't tell you.
Q. Is it not true that it was in your house?
A. I don't know.
Q. When did you last see it in your house?
A. I don't know; but it was within a couple of days.
Q. He didn't take it away when he bought it?
A. No, sir; I was at his house when I sold it to him.
Q. Is it not a fact that he got it at your house that morning?
A. I never saw him until the shooting was done, and if he did I don't know it.
Q. You came down from your house to his house?
A. I was at Mr. Houston's, and Houston and I came down to his house together.
Q. How long have you known Jerry Wallace?
A. We have lived neighbors two or three years.
Q. Do you know if he had trouble before?
A. Him and Alex Zane has had trouble ever since I knowed him.
Q. You know he had been frequently in quarrels?
A. I never heard of him quarreling with anybody but Alex Zane and Ead Wallace.
Q. That is two men, then, in three years that he had trouble with?
A. I never knew of him any trouble with any but just them.
Q. After the shot was fired you turned around and went away?

A. No, I didn't; I stayed there until Mr. Zane fell down and they come and put him in a wagon and went off with him.

Q. Was there anything between where you stood and these other men that would have prevented them from seeing you?

106 A. If they had looked up on the hill they could have seen me; I seen them plain enough.

Q. And if they did not see you it was not because there was any obstruction?

A. No, sir.

Redirect examination by Mr. CHEESEMAN:

Q. What kind of a morning was it?

A. Clear, bright morning.

Q. How long did you say you had known Jerry Wallace?

A. Three years.

Q. Do you know anything as to Jerry's condition on this morning as to his eyesight?

A. No; but a while previous to that he was near about blind and I had been waiting on him, getting his firewood for him and doing his chores, and I told him to keep in the house until his eyes got better.

Q. After the wagon had driven away with the body of Alex Zane, what did you do?

(Objected to by plaintiff. Objection overruled.)

A. I walked right down to Mr. Wallace's house, and when I saw him I saw the blood running down his back, and I said, "What is the matter Jerry?" and he said, "The boy stabbed me," and I said, "Can I do anything for you," and he said, "No, only to take me to the doctor," and I took him.

Q. After you got to Seneca what did he do, if anything, in your presence?

A. I took him to the doctor's and built up a fire and the doctor dressed his wound.

Q. After that, what did you do?

A. Brought him back home, and the marshal/ came on behind us.

Q. I will ask you, Mr. Collins, if Jerry Wallace went to the justice of the peace?

(Objected to by plaintiff. Objection overruled.)

107 A. Yes; he went to the justice of the peace and offered to give himself up, and the justice said he had no jurisdiction over it at all and couldn't do anything with it.

108 WILLIAM HOUSTON, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Houston?

A. Newton County, Missouri.

Q. Are you the Mr. Houston that the last witness spoke about?

A. Yes, sir; I am the man.

Q. Were you present with him on the morning of March 7th last?

A. Yes, sir.

Q. At or near the residence of Jerry Wallace?

A. Yes, sir.

Q. Where did you meet Mr. Collins?

A. He come to my house, and we went down there together.

Q. And about what point did you come to the near vicinity of this field?

A. Almost due north to where this transaction occurred.

Q. Where was Mr. Wallace's house with reference to where you said you were?

A. It laid to the west.

Q. What did you first hear or see when you come there?

A. I first observed this noise and loud talk on the upper end of the field, and I went up on the rise of the hill, and I could have a full view of all the parties above.

Q. Who was there?

Ead Wallace, Bayley, and John Lamont.

Q. What were they doing, if anything, that you saw?

A. Driving posts.

Q. Where was Zane?

A. Zane was at this post about on the line almost two hundred yards west.

Q. And where was Noah Zane?

A. I didn't see him.

Q. Now, go on and tell the jury what you saw there.

A. As we arrived over the hill there I saw Mr. Zane and Mr. Jerry standing there, and Mr. Zane had his left hand on the post, and now I don't know that I could discern anything safe, that I can't say, but there was a demonstration made by Mr. Zane.

109 JUDGE. Show what it was.

A. He throwed up his hand this way [indicating], with this hand on the post, and the next thing was a gun fired by Wallace, and he crept and walked off about forty yards from this post and fell.

Q. How was Zane dressed that morning?

A. As near as I can remember he was dressed something like—well, he had on a full suit of clothes.

Q. After the shooting, did you go with Mr. Collins and Wallace over to Seneca?

A. Yes, sir.

Q. State if Jerry Wallace went to the justice of the peace there.

A. He did, sir; for a fact.

Q. What did he do?

A. He gave himself up, and the justice said he had no jurisdiction over him unless he had—unless somebody had made complaint.

Q. Then what did you do?

A. I passed over to the post-office.

Q. You and Jerry, I mean?

(Plaintiff objects. Objection sustained. Defendant excepts.)

Cross-examination by W. C. PERRY:

Q. Jerry knew that the justice of the peace had no jurisdiction, didn't he?

A. I don't know.

Q. Well, you knew that a justice of the peace over in Missouri didn't have anything to do with the matter of killing a man in the Indian Territory?

A. I don't know. I never had anything to do with law before in my life.

Q. And you didn't even have knowledge enough to know that a justice in Missouri could have nothing to do with the prosecution of a man for a crime committed in the Indian Territory?

A. Of course; I am not posted in law.

110 Q. You mean to say that you didn't know that?

A. That is, I don't know the position of a——

JUDGE. Did you know that or not?

A. I had an idea.

Q. You knew that a justice of the peace in Missouri had no jurisdiction of a man for killing a man in the Indian Territory?

A. No, sir; didn't know anything about it.

Q. You didn't go down to look at the body of Alex Zane after he was shot?

A. No, sir.

Q. If you were there, there was no doubt but that they could see you?

A. I reckon so.

Q. You seen them?

A. I did, certainly.

Q. Zane was dressed, you say, as an old soldier?

A. Yes, sir; a kind of a navy blue like they always wore. He always claimed he was an old soldier.

Q. You say you saw him raise up his right hand to his breast and that was just before Jerry Wallace shot him?

A. Yes, sir.

111 JERRY WALLACE, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct-examination by J. H. PRATT:

Q. Mr. Wallace, are you the defendant in this case?

A. Yes, sir.

Q. You know the charge against you?

A. Yes, sir.

Q. Now, with reference to the 7th of March, 1895, tell the jury what occurred that morning and how it occurred.

A. Well, on this day, the 7th of March, I was ploughing in the field and my wife came down in the field and told me that Mr. Zane——

Q. Just tell what you know of your own knowledge.

A. Mr. Zane came down in the field there, and when he come within forty or fifty yards I asked of him if that was his force and, if so, to take it and get out of there; that he had no right there.

Q. What occurred, if anything?

A. I stopped and ordered him out two or three or four times, and he kept continuously on until he got to the east end of the field and I went on through to the west end and took my team out and took it to the barn. I didn't like the conduct of these people. They were noisy, hollering

and singing, and acting as if they were drank to me, and I guess no doubt was, and I came past the house after putting my team up and I took my shotgun and went down into the field. I went up pretty close to Mr. Zane and ordered him out three or four times, and then I think I asked him if he was going out and he made no reply just at that time, and then I asked of him whether he was going or not, and about this time I was struck in the back, and Mr. Zane made a grab like this [indicating], and he was standing with his right hand on the post; about the time I was struck in the back he made this motion [indicating] and says, "Damn you, I will kill you;" and then my wife hollers, or at least she
112 says, "Look out, Jerry," and I fired this gun.

Q. State why you took that gun down in the field.

A. Because I was afraid of this party, and most especially of Alex Zane himself, and I didn't feel safe without some protection.

Q. Why did you feel afraid?

A. I had heard of his threats to me, and have had different things communicated to me.

Q. What were these threats about?

A. That he would kill me.

(Plaintiff objects because threats are inadmissible in this case in the present condition. Objection sustained. Defendant excepts.)

Q. You may state, Mr. Wallace, what Zane did at that time, just before you fired the shot.

A. He just took his hand something like this [indicating] saying, "Damn you, I will kill you."

Q. You may state to the jury from that demonstration what you believed Zane was about to do.

(Plaintiff objects. Objection sustained. Defendant excepts.)

Q. Mr. Wallace, you may state how long you have lived on this place in question.

A. It will be four years this coming September.

Q. State whether or not you have cultivated any land there on these premises.

(Plaintiff objects as going into the title of the land. Objection overruled.)

A. Yes, sir; for three years.

Q. You may describe, Mr. Wallace, the premises, the fence, the house, &c., and tell how they are located.

A. Well, as near as I can tell, the farming land lays in the valley; on both sides of this valley is timber land, and the valley east and west is quite a distance long, and the residence is pretty well to the east
113 part of the place on the north side of the field where we were living; there was a rail fence around the place with the exception of a quarter of a mile, and there was wire and board fence.

Q. You may state, Mr. Wallace, what you did after the shooting.

A. After the shooting I went into Seneca and offered myself up there to Mr. Grear. I understood he was a justice of the peace, and I told him we had some trouble and that I had come to talk to him about it, and I was ready, if I had done anything wrong, to give myself up, and he said he had no authority or jurisdiction to do anything, and I asked him

what to do, and he told me I would have to go to the agency or some police, and I told him if that was true I would just go back home and wait till the police come to the house, and if they wanted to get me he could tell them that they would find me right at home; and when I got about a quarter of a mile from home they overtook me, and then he went to my house and staid all night, and on the night of the 8th we got into Baxter Springs and I turned myself over there to the commissioner, and in the evening the marshal/ come around and then I was turned over to him. I believe that was on the 8th, as near as I can remember.

Where were you taken to by the marshal/ after you surrendered yourself at Baxter Springs?

(Plaintiff objects. Objection overruled.)

A. I was taken to Baxter Springs to Columbus by the marshal/, Mr. Jones.

Q. Where did the marshal/ put you after you got to Columbus?

A. In the county jail.

Q. You may state to the jury the condition of your wounds.

(Plaintiff objects. Objection overruled.)

Q. You may state the nature of your wounds.

A. One of the wounds was a stab in the shoulder struck by a hatchet blade, and I guess from what the doctor said it was about through
114 the shoulder blade, and I was struck with something, I don't know what it was, and I was black all round my stomach, but what I was struck with I don't know what it was.

PRATT. Your honor, we would prove that the deceased, Alex Zane, had frequently threatened the life of this defendant, and that these threats had been communicated to him.

(The offer is objected to by plaintiff. Objection sustained, and defendant excepts.)

Q. Mr. Wallace, you may state when you were married to Jane Zane, the daughter of the deceased.

A. In the lattr part of 1891, as near as I can remember.

Q. How long had you known Zane prior to that time?

A. I have known him, I guess, twenty years.

Q. You may state what trouble, if any, you had with him prior to that time, or prior to your marriage.

(Objected to by plaintiff. Objection sustained. Defendant excepts.)

Please the court, we want to prove by the defendant that prior to his marriage to his present wife, Jane Zane, that he was driven out of Zane's house at the point of the muzzle of a shotgun in the hands of Alex Zane.

(Plaintiff objects to the offer. Objection sustained. Defendant excepts.)

Q. Did you hear the testimony of Mr. Robinson?

A. Yes, sir; I did.

Q. Did you tell him at the city of Joplin, Missouri, that if he was a friend to Alex Zane that he was a friend to a damned old rascal, and that you come near killing him once, and that if he fooled with you much you would kill him?

A. I did not. Gentlemen of the jury, I never had a talk with that man in regard to Alex Zane in my life.

115 Q. You may state to the jury if ever in your life you threatened the life of Alex Zane.

A. I never have; no, sir.

Cross-examination by W. C. PERRY:

Q. You know Mr. Robinson, do you, Mr. Wallace?

A. Slightly acquainted with him.

Q. He lives down there in your part of the country?

A. Lives west of me.

Q. He has just manufactured this story about the conversation he had with you at Joplin?

A. Yes, sir; undoubtedly. I never had any talk with him in my life about Alex Zane.

Q. How did you get the right to live in the Wyandotte Reservation?

A. Through my wife.

Q. You are not a Wyandotte Indian?

A. No, sir.

Q. You are a white man?

A. Yes, sir.

Q. And if you have any land down there it is because your wife is a member of the tribe?

A. Yes, sir.

Q. You are what they call a "squaw man."

A. Yes, sir. Some of them call us that.

Q. What did you quit plowing for that morning?

A. To see what they were going to do.

Q. You quit plowing and went up to your house to see what they were going to do through a shotgun?

A. I wanted to see what those men were going to do.

Q. Why did you take your team up to the stable?

A. Because my team wouldn't stand.

Q. Where did you go after you left the field?

A. To the house.

Q. What house?

A. My house.

Q. Where else did you go?

A. Down in the field.

Q. Was that the only place you went?

A. Yes, sir.

116 Q. Where were you that half hour you were gone?

A. I suppose I was knocking around the house and barn.

Q. You were gone a half hour after you left the field before you came back?

A. I don't about that.

Q. How long do you say you were gone?

A. It might have been a half hour or more for all I know.

Q. How far does this man Collins live from you?

A. About a quarter of a mile.

Q. Didn't you go to his house?

A. No, sir.

Q. Didn't you, on your way down there, stop and talk to Mrs. Denmark?

A. No, sir; not on that morning.

Q. Didn't you go down there on the morning that you killed Alex Zane, and come right straight back with the gun and pass Mrs. Denmark on your way to his house, and on your way back stop and talk to her?

A. No, sir.

Q. Where did you get that gun?

A. I got it from Mr. Collins.

Q. When?

A. Some three or four days previous to that.

Q. Where was it that morning?

A. In my house.

Q. Where was it in your house?

A. In the loft.

Q. Is it a muzzle-loaded gun or a barrel-loaded gun?

A. It is a muzzle-loader.

Q. Was there caps on it?

A. Yes, sir.

Q. Where did you keep it?

A. In the house.

Q. Did you look at it that morning before you took it down to the field?

A. No more that at any other time.

Q. What did you take it down there in the field for?

A. For protection.

Q. For protection?

A. Yes, sir.

Q. You wouldn't have needed any protection if you had not
117 gone down there.

Q. I thought I had a right to go in my own field.

Q. But if you had not gone back into the field you wouldn't have needed protection?

A. Probably.

Q. If you thought that was your field and that Mr. Zane was trespassing on your property, why didn't you go to the courts and settle it there instead of taking a shotgun and settling it with that?

A. I had it in the courts about three years, and the court had settled and give this land to us.

Q. And so you thought you would go down there and settle their decree with a shotgun?

A. I thought I was justified in going down there and looking after our own property.

Q. Don't you know that is not true?

A. Possibly I do.

Q. Don't you know that your wife didn't own that land, and didn't you know then that your wife didn't have any more title to that land than I have?

A. I think to this moment, sir, that she had a title to it.

Q. The Indians got a patent to that land?

A. Yes, sir.

Q. Has your wife got a patent to that land?

A. Yes, sir; to the best of my knowledge.

Q. No question of knowledge about it; did she have a patent to it?
A. Yes, sir. I am no scholar. I don't suppose I could read it.
Q. There are courts down in the Indian Territory?
A. Yes, sir.
Q. Outside of the Indian courts?
I believe there are at Vanita.
Q. Why didn't you go down there?
A. It is a considerable distance down there.
Q. Ah, it was a little farther down there than it was to the shotgun?
118 A. I didn't go down there to harm anyone, only to protect myself.
Q. Well, why did you take your shotgun?
A. As I stated before, I was afraid of that party.
Q. You know the Denmark girl?
A. Yes, sir.
Q. She worked at your house?
A. Yes, sir.
Q. Where did you keep your shotgun?
A. Some of the time in the loft.
Q. Where did you get it from that morning that you shot Zane?
A. In the loft.
Q. Was this girl there?
A. I don't know.
Q. Did you see her there?
A. She was not at the house.
Q. Well, didn't you see her there?
A. I knew she was there that day, but I didn't see her when I got the gun.
Q. Didn't you know she was there at the house, or near the house, when you went up there?
A. I didn't see her at the time I went to the house.
Q. Where was your wife when you went to the house?
A. In the field.
Q. She didn't go up with you?
A. I don't know what she done, I was not with her.
Q. You had no other object in taking the shotgun down there only to protect yourself?
A. That is all.
Q. What was the gun loaded with?
A. Shot.
Q. And gunpowder?
A. Yes, sir.
Q. You shot it off against Alex Zane and killed him?
A. I suppose I shot him; yes, sir.
Q. You suppose you shot him; don't you know you did?
A. Yes, sir.
Q. You tried to shoot the boy?
A. No, sir.
Q. Didn't you pull the gun on him.
A. Yes, sir.

Q. What did you do that for?

119 A. To stop him from butchering me.

Q. Did you pull the gun on him?

A. Yes, sir.

Q. You were just bluffing him?

A. Yes, sir; I told him I didn't want to shoot him.

Q. What did you load the gun again for afterwards in the field?

A. I didn't know about what the rest of this party was going to do.

Q. You took the gun and powder and shot down there?

A. Yes, sir.

Q. And after you had shot the old man Zane you reloaded again?

A. Yes, sir.

Q. And then after you had reloaded and put caps on it then you told these other men to get out of there?

A. I told them before that.

Q. And after it too?

A. Well, I don't know; I might have told them afterwards.

Q. What did you load it again for; to protect yourself?

A. Yes, sir; I did.

Q. What did you want to protect yourself from them for?

A. I had had some trouble with them.

Q. And that was the way you protected yourself?

A. I was afraid of these men.

Q. Afraid of them?

A. Yes, sir; I was, really.

Q. What did you go to that justice of the peace for; you knew he didn't have anything to do with you, didn't you?

A. No, sir; I didn't.

Q. Do you pretend to say to this jury now that you didn't know that a justice of the peace in Missouri had nothing to do with a crime that was committed in the Indian Territory?

A. I didn't know but what I could give up myself there, I supposed he had authority for that.

Q. You knew that there was a United States court at Vaniti, in the Indian Territory?

A. Yes, sir; I knew that.

120 Q. You knew that there was a commissioner of this court at Baxter Springs?

A. I didn't know that until I was told so.

Q. Were you ever at Baxter Springs?

A. I had not been there for many years.

Q. Never have been a witness there?

A. Never.

Q. You had known Alex Zane a good many years?

A. Yes, sir; quite a long time.

Q. Before the war?

A. No, sir.

Q. Since the war?

A. Yes, sir.

Q. You knew that he belonged to Wyandotte Indian tribe?

A. He claimed to be a Wyandotte.

Q. He was practically a white man?
A. Yes, sir; he was not only white, but he was red.
Q. Was he both?
A. Yes, sir; he was red—red and white skin.
Q. You know he had been in the Army during the war?
A. I don't know it; no, sir.
Q. You knew he claimed to have been?
A. Yes, sir.
Q. You knew he wore clothes and badges, such as old soldiers wear?
A. Yes, sir.
Q. He didn't speak to you that morning before you got the shotgun or after?
A. Only when he put his hand up and made that motion as though he was armed, to do something, and said "Damn you, I will kill you."
Q. Did you go up to his body after you killed him?
A. No, sir; I didn't.
Q. You don't know that he didn't have anything in his breast, any gun or anything else?
A. I don't, sir; I only know by seeing his boy draw something from his person.
Q. You saw the boy have a little hatchet there, and if you saw him do anything at all you saw him take it from his father's hip pocket?
121 A. I saw him take it from his person, but I wouldn't be positive as to where.

Redirect examination by Mr. PRATT:

Q. In answer to the district attorney's question you stated that your wife had a patent to this land in controversy.
A. Yes, sir; undoubtedly she has.
Q. I will get you to examine that and state whether or not that is the patent [handing witness paper].
A. I can't see well enough to examine it.
Q. I will ask you if you knew of your own knowledge that your wife did receive a patent from the United States Government for this land?
A. I do.
Q. Now you may state whether or not, after receiving this patent, your had a survey of the land made?
(Objected to by plaintiff. Objection overruled.)
A. I had it surveyed twice.
Q. Who made the survey?
A. Mr. R. S. Patterson. I had another man by the name of Billy Duran make another survey.
Q. What was your wife's name before marriage?
A. Zane.
Q. Her given name?
A. Janie Zane.
Q. You may state after the survey was made whether or not the matter that was in controversy between you and Alex Zane was submitted to the Indian courts for adjudication.
(Objected to by plaintiff, as the record is the best evidence.)
PRATT. There is no records.
(Objection overruled.)

A. Yes, sir.

Q. What was the result?

(The United States attorney objects on the grounds that he does not understand that there is any Indian court; and in the second
122 place, if there was any Indian court there ought to have been a record, and if there was no record it was not much of a court; and that this land had been surveyed by the United States Government, of which there is a public record. Objection sustained, to which ruling of the court defendant excepts.)

123 LAFAYETTE LEWIS, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Lewis?

A. In McDonald County, Missouri.

Q. Where were you on the 7th of March last?

A. I was down at Jerry Wallace's.

Q. In the Wyandotte Reservation?

A. Yes, sir.

Q. Were you at work at the time?

A. Yes, sir.

Q. Who else was present?

A. Mr. Denmark, Jerry Wallace's wife, Danmark's daughter, Alex Zane, Bailey, Noah Zane, and Lamont were there.

Q. Were you in the field when these men came in from the southwest part of it?

A. Yes, sir.

Q. About what time did you get into the field that morning?

A. Somewhere near about eight o'clock—between seven and eight—nearer eight I expect.

Q. Where were these men, Bailey, Lamont, and Ead Wallace, at the time you first came into the field?

A. When I first came inside they were nearly over to the east fence, and, in fact, the lead team was right at the fence just at the State line when I first saw them.

Q. What did you commence to do as soon as you got into the field?

A. I shut the gate and went right on down to the land where I had been plowing the day before and hitched my team to the plow and went on through.

Q. Where was Alex Zane?

A. At the east end of the field at the State line, or next to the State line.

Q. When you commenced to plough were you north or south of those parties?

A. I was north and west.

124 Q. Did you see Wallace when he came down from the house?

A. Yes, sir.

Q. Did he have a gun?

A. Yes, sir.

Q. Did you see him when he first came into the field?

A. Yes, sir.
Q. How was he walking?
A. In a moderate gate; didn't seem to be in any hurry.
Q. How with reference to his ordinary way of walking along?
A. About his usual way of walking.
Q. Where was Mrs. Wallace at about this time?
A. Standing at the plough where I was.
Q. And who else, if anybody, was there?
A. Denmark and his daughter.
Q. State if Jerry Wallace came down there to your near vicinity with his gun.
A. Yes, sir; he came up within a few steps of me.
Q. Did he stop a moment?
A. No; he just come up close to us and said, "Now, Janie, I want you to order these gentlemen out of here," and then went on down there.
Q. Who went down?
A. Jerry and his wife.
Q. What did they do then?
A. His wife ordered them out, and Jerry also, and he asked Zane if he was going to go, but I never heard Zane say a word, and then he told him the second time, and he looked up towards him, with his left hand on the post, and threw his hand up this way [indicating] and said: "Damn you, I am going to kill you!"
Q. Show to the jury how he was standing.
A. I am fronting the east, and this is the post [indicating], and Mr. Zane was standing south of the post, and a little back was Wallace, something like that, and when Jerry ordered him the second time he turned and kind of looked at him and threw his hand up this way to his bosom and said, "Damn you, I will kill you!" and at that moment the
125 boy struck Jerry with the knife and Jerry shot him.

Cross-examination by W. C. PERRY:

Q. What is your business?
A. Farmer.
Q. What kind of a farmer?
A. I raise oats and corn and everything like grain.
Q. Who for?
A. For myself.
Q. What were you doing over there the morning of the 7th of March?
A. I was over there hired to plough ground.
Q. Do you own a farm?
A. Yes, sir; I own a little farm.
Q. Where is it?
A. From this place about two miles and a half or three miles, at McDonald Town.
Q. How much of a place have you got?
A. Sixty-two acres and twenty-four hundredths.
Q. You own that?
A. Yes, sir; I own it.
Q. And yet you were up there working for this man in this field?
A. Yes, sir.
Q. How big was that field?

A. There was something like, I suppose, sixty or seventy acres in that field.

Q. In cultivation?

A. Yes, sir.

Q. Was anybody with you?

A. Mr. Denmark was in there ploughing, too.

Q. When you came there, was there anybody with you?

A. No, sir.

Q. Where was Jerry Wallace at the time you went into the field?

A. Couldn't tell you.

Q. Was he ploughing?

A. No, sir.

Q. If he had been ploughing that morning he had quit and gone away?

A. Yes, sir.

Q. Denmark was still at work?

A. Yes, sir.

Q. Denmark and you were pretty close together?

A. Yes, sir.

Q. How long after you got there before Wallace came back with the shotgun?

126 A. I had just got half down on the north side, and I stopped there; it had not been over fifteen or twenty minutes after I got in there before he come in.

Q. How did he come in from the field?

A. Right from his own house.

Q. The road from his house led right on up to Collins' house?

A. There is a road that goes from his house to Collins', but he was not on that road. Collins' house was back northeast, and Jerry come from the northwest. He was coming from the northwest right from the house towards me, and when he got a little above me he got over the fence.

Q. When you first saw him coming from the house, where was Mrs. Wallace?

A. Standing right where I was.

Q. Where was Denmark?

A. Right there, too.

Q. You three were there together and the Denmark girl?

A. Yes, sir.

Q. That was four of you?

A. Yes, sir.

Q. You found out there before he came back that he had gone to get a gun?

A. No, sir; I didn't.

Q. Did you know he had a gun?

A. No, sir; I didn't know whether he had been in the field or not.

Q. I understand you now that at that time he had gone to get the gun?

A. No, sir; I didn't know anything about that.

Q. You were at that time how far from Alex Zane?

A. Just twenty steps.

Q. He was east of you?

A. South of me and east a little—not much.

Q. Where was the boy?

A. Noah Zane?
Q. Yes.
A. He was west.
127 Q. About how far?
A. Forty or fifty feet.
Q. What was the boy doing?
A. He was setting up posts.
Q. And Ead Wallace, Lamont, and Zane were east?
A. Yes, sir.
Q. You were thirty or forty feet or yards from Zane?
A. Twenty steps.
Q. You know Mrs. Wallace?
A. Yes, sir,
A. And Denmark?
A. Yes, sir.
Q. And Denmark's girl?
A. Yes, sir.
Q. From the time you gathered there, you four, and Wallace came into the field, how long was it?
A. I couldn't tell exactly; from twenty to thirty minutes.
Q. Did any of you speak to Zane?
A. No, sir; none but Mr. Denmark.
Q. Did he speak to you?
A. Not then.
Q. Did he speak to you before that?
A. Yes, sir.
Q. Was he pleasant enough?
A. Yes, sir; he had no right to speak any other way to me.
Q. Well, he had no fire arms that you saw, did he?
A. No, sir.
Q. You didn't see him take anything out of his breast?
A. No; he didn't have a chance to.
Q. And yet you say in the face of that shotgun he put his hand up to his breast and says, "Damn you, I will kill you?"
A. Yes, sir; he did.
Q. He committed suicide, didn't he?
A. I don't know what you would pronounce it.
Q. The boy struck Jerry with a little bit of a pocket knife?
A. I don't know the size of the knife.
Q. You didn't tell the jury how far Wallace was from Zane when he shot him.
A. I haven't been asked that. It was about fourteen or fifteen feet.
Q. You saw the hatchet there after that?
A. Yes, sir.
128 Q. The boy had it?
A. Yes, sir.
Q. Took it off of his father's person?
A. Yes, sir.
Q. That is all you saw in the way of weapons that Zane with which he could kill anybody?
A. Yes, sir.

Q. And that was a tool that any man would have use for in building a fence?

A. It depends on what sort of a fence he would build.

Q. You knew it was a hatchet?

A. Yes, sir; I would call it a hatchet.

Q. It is what we all call a hatchet?

A. Yes, sir.

Q. Did you see Jerry, after he had shot the old man, pull the gun down on the boy?

A. Yes, sir.

Q. Snapped it at him?

A. Couldn't say as to that.

Q. And after he done that, didn't he say it snapped twice, but the damn thing wouldn't go off?

A. It didn't snap when it went off.

Q. And it was after he pursued the boy and pulled the gun down on him that he came back and said the damned thing didn't snap; how far did he follow the boy?

A. Not at all.

Q. When did he come back?

A. He just stepped over to us, about twenty steps from Zane.

Q. Didn't you know when he stepped *passed* you he was going to kill him?

A. No, sir.

Q. What did you imagine he was going to do with that gun?

A. To get those men off of his land.

Q. And was going to do it with that gun?

A. I don't suppose he felt himself able to fight a band of men.

Q. Why did you know that?

A. Because I know he was a weakly man.

Q. You have talked that over with Jerry Wallace?

A. No, sir.

Q. You are a great friend of Jerry's?

129 A. No more than to any other man.

Q. You didn' feel that way towards old man Zane?

A. I don't know.

Q. The reason you are testifying so falsely is because you have a good feeling towards him?

A. I have no further reason.

Q. You saw him load his gun after he had killed the old man?

A. Yes, sir.

Q. Reloaded it with No. 4 shot?

A. Something like that. I thought it was turkey shot, or something of that kind.

Q. Then when he had reloaded his gun he told these other men to get out of there?

A. Yes, sir.

Q. Now, then, after he had reloaded the gun, and had given these other men to understand that they must get out of there, then you took the trouble to look at old man Zane?

A. No, sir; I couldn't leave my team if there was a thousand to die.

Redirect examination by Mr. CHEESEMAN:

Q. Did you hear anyone say anything to Mr. Wallace before he reloaded the gun?

A. I don't know.

Q. I will ask you, Mr. Lewis, if you recollect that [handing witness photograph]?

A. Yes, sir.

Q. What is it?

A. That is a photograph of the position of the people that were in the field that morning; at least it looks like the field they were in.

Q. This point up here being the east side?

A. Yes, sir.

(CHEESEMAN. We offer this photograph in evidence. Plaintiff objects for the reason that it was not taken at the time of the murder. Objection sustained, to which ruling of the court the defendant excepts.)

No cross-examination by W. C. PERRY.

130 Q. When Wallace came down there towards you people he had the shotgun in this style [indicating], holding it in both hands in front of his person?

A. When I first saw him he was carrying it in his hand and the other hand was hanging by his side, and when he got over the fence he took it in both hands and walked right on up with it in both hands, this way [indicating], holding it in both hands in front of his person.

Q. And when he got before Zane he held it like a person ordinarily does when he shoots a gun?

A. Yes, sir; only he didn't have it up to his shoulder.

131 S. R. PATTERSON, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Patterson?

A. Neosho, Missouri.

Q. What is your occupation and calling in life?

A. I am a civil engineer.

(This is all admitted by the plaintiff.)

Q. Did you make a survey on the premises occupied by Jerry Wallace and his wife?

A. Yes, sir; at one time. I made the survey about two years ago, I expect.

Q. Have you made a survey at any other time of the premises?

A. I retraced that same survey.

Q. When was that?

A. Within the last two months.

Q. Did you make map and plat of the survey you made on each occasion?

A. Yes, sir; I did.

Q. Is that the map or plat you made of the first survey [handing witness paper]?

A. Yes, sir.

Q. And is the one of which you made the second survey?

A. Yes, sir. I located the house and well and all important points there.

(Defendant offers the plat and map for evidence to show the location.)

PERRY. Do you know at the time you made this survey that a gentleman by the name of Hardwick and a man by the name of Powers, employed by the Government, had surveyed these lands and made allotments to the Indians?

A. I didn't know they had made any survey.

Q. Didn't you know they had traced the lines?

A. No, sir.

132 JUDGE. What was the basis of your survey?

A. I simply went down with Mr. Wallace, at his request, to survey what he said was his own.

Well, then the evidence is not competent.

Q. (CHEESEMAN.) I will ask you if there was not a fractional lot you surveyed?

A. I surveyed fractional lots three and four, and lot No. two I didn't survey, because he didn't want it surveyed.

Q. From this document?

A. This described lot No. two and three and the NW. ¼ of the SW. ¼.

Q. Is that the description?

A. That is the description here. Lots two and three and the NW. ¼ of the SW. ¼ of sec. 33, town. 22, range 25 east of the principal meridian.

Q. Was that the basis of your survey?

A. That was what I endeavored to find this piece of property from.

Q. But you surveyed what he claimed?

A. Yes, sir; I surveyed what he claimed.

Q. Did you survey the Jerry Wallace property?

(Plaintiff objects for the reason he does not know Jerry Wallace's property. Objection overruled.)

A. He claimed he owned that portion of the section, and I went by the notes he gave me.

Q. Did you survey the land described in this patent?

A. Yes, sir.

Q. How did you find it?

A. I went according to the field notes that I had.

Q. (JUDGE.) That the defendant furnished you?

A. Yes, sir.

Q. Do you know whether these field notes are correct or not?

A. I didn't get them from the agent.

Q. Don't you know whether they are correct or not?

A. It may be they are correct, but I am not certain of it.

133 Your honor, we wish to introduce in evidence this patent issued by the Government to Janea Zane.

(It is admitted as evidence. Cheeseman read the patent.)

134 R. C. PATTERSON, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you reside, Mr. Patterson?

A. Seneca, Missouri.

Q. What is your business and occupation?

A. Stonecutter and horseshoer.

Q. Where did you live on or about the sixth day of March last?

A. Seneca.

Q. On or about that date did you meet Alex Zane and have a conversation with him?

A. I met him on the 6th, in Seneca.

Q. Did you talk about Jerry Wallace with him?

A. Yes, sir.

Q. What, if anything, was said in that conversation in relation to threats against the life of Jerry Wallace at that time?

(Plaintiff objects. Objection sustained, to which the defendant excepts.)

Q. You may state if anything was said by Alex Zane with reference to what he intended to do the next day down on Jerry Wallace's place?

(Plaintiff objects. Objection sustained, to which the defendant excepts.)

We offer to prove, your honor, by this witness, that in a conversation with Alex Zane the day before the shooting occurred he had a conversation with Zane in which Zane said to him that he was going down there to build a fence across this property of Wallace's the next day and if Jerry Wallace fooled with him he would kill the blind son of a bitch.

135 (Plaintiff objects to the evidence. Objection sustained, to which defendant excepts.)

Q. I will ask you to state if on that day you met him in Seneca that Zane had any whiskey?

(Plaintiff objects. Objection sustained, to which the defendant excepts.)

Q. I will ask you to state if in that conversation Zane stated to you what he had got that whiskey for?

(Plaintiff objects. Objection sustained, to which the defendant excepts.)

We offer to prove, your honor, that in that conversation Alex Zane stated to this witness that he had got that whiskey for the purpose of bracing himself up for the purpose of building this fence across the land of this defendant, Jerry Wallace.

(Plaintiff objects to the evidence. Objection sustained, to which the defendant excepts.)

Q. How long have you been acquainted with Jerry Wallace?

A. I have known him about five years.

Q. Are you acquainted with his character for peaceableness?

A. I couldn't hardly say that I was.

136 CHARLES LUKE, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you reside, Mr. Luke?

A. Seneca, Missouri.

Q. Were you living there on or about the 6th of March last?

A. Yes, sir.

Q. Did you meet and have a conversation with Alex Zane there in Seneca on that day?

A. I did, sir.

Q. In that conversation did you have a talk about Jerry Wallace?

A. I did.

Q. In that talk were any threats made by Alex Zane against the life of Wallace?

A. Yes, sir.

(Plaintiff objects. Objection sustained, to which the defendant excepts.)

Q. Now, I will ask you to state what that conversation was.

(Plaintiff objects. Objection sustained, to which objection defendant excepts.)

We offer to prove, your honor, that in this conversation had with this witness and Alex Zane, that Alex Zane said to this witness that he was going down to build a fence across Wallace's land, and that if Jerry Wallace interfered with him that he would kill him, or shoot the blind son of a bitch, and that all these threats were communicated to Jerry Wallace.

(Plaintiff objects to the evidence. Objection sustained, to which defendant excepts.)

137 Mrs. ALICE SARGENT, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mrs. Sargent?

A. In the Indian Territory.

Q. What is your relation to the defendant in this case?

A. I am his sister.

Q. Did you know Alexander Zane in his life time?

A. Yes, sir.

Q. Do you live near him?

A. Yes, sir.

Q. Prior to March 7th last did you have a conversation with him, Alex Zane, about Jerry Wallace?

A. I did.

Q. When was it?

A. It was in February—somewhere near the middle of February.

Q. Of what year?

A. Of this year, in February.

Q. Where did that conversation take place?

A. It was in my kitchen at my house.

Q. In that conversation you may state if any threats were made by Alex Zane against the life of Jerry Wallace.

(Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts.)

We offer to prove by this witness, your honor, that on this occasion Alex Zane said to this woman and threatened that he would kill Jerry

Wallace, and that he had a knife that he was carrying at that time for that purpose, and that these threats were communicated to Jerry Wallace by this witness afterwards.

(Objection to by plaintiff. Objection sustained, to which ruling of the court defendant excepts.)

138 HUGH LESTER, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Lester?
A. I live in the Seneca Reservation.
Q. What is your business or occupation in life?
A. Farmer.
Q. Have you been in any other occupation besides farming?
A. No, sir.
Q. Did you at one time assist Alex Zane in making a survey down there in the Wyandotte Reservation?
A. Yes, sir.
Q. When was that?
A. In May, I think, in 1894.
Q. What land and premises did you survey?
A. Jerry Wallace's.
Q. Who assisted in the survey?
A. Ead Wallace and myself and Mr. Alex Zane.
Q. Who was the surveyor that surveyed the land at the time?
A. Mr. Powers.
Q. I will ask you if at the time you made that survey if you found a monument or survey corner on this land?
A. On the south side we found what we supposed to be a corner, but then it was moved some before we started to survey from that corner.
Q. Who moved it?
A. Mr. Zane, through the order of Mr. Power.
Q. If I understand you right, you found a monument on this land?
A. Yes, sir.
Q. It was moved?
A. Yes, sir.
Q. How far?
A. About three rods.
Q. What position did you have at the time?
A. We were chain carriers, myself and Ead Wallace.
Q. I will ask you if you run north and south from that corner where you moved the monument.
A. We started at the southwest corner and run north.
139 Q. I will ask you if Alex Zane carried the chain on that line.
A. Yes, sir; he carried it down to the fractional lot where those hickory trees are in the field.
Q. What line was that?
A. Southwest line running north.

Q. I will ask you if you stopped running that line at this clump of trees?

A. Yes, sir.

Q. I will ask you if you and Ead Wallace and Zane had a talk there while you rested?

A. Yes, sir; we had a little talk there while Mr. Patterson and Mr. Powers was up on the hill.

Q. I will ask you what Alex Zane said, if anything, relative to carrying the chain that you run up there.

(Plaintiff objects. Objection sustained, to which ruling of the court the defendant excepts.)

Your honor, we offer to prove by this witness that Alex Zane said to him that the reason why he wanted to carry this chain on this line was that he wanted to gain four feet on each chain in order to make his corner where he wanted, and he further said, "Boys, if you ever tell of this I will break your heads with a stick."

(Plaintiff objects to the evidence. Objection sustained, to which ruling of the court defendant excepts.)

(This was afterward admitted.)

140 SAMUEL TAYLOR, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Taylor?

A. Twenty-one miles south of Seneca.

Q. Is that near the neighborhood of where Jerry Wallace lives?

A. About four miles.

Q. Were you acquainted with Alex. Zane in his lifetime?

A. Yes, sir.

Q. Acquainted with Jerry Wallace?

A. Slightly; knew him when I saw him.

Q. Did you meet and have a conversation with Alex Zane on or about the 6th day of March last, about Jerry Wallace?

A. Yes, sir.

Q. Where did you meet him?

A. On the road from Seneca to my house, over by the Shawnee farm.

Q. In that conversation did Zane say anything about Jerry Wallace as to doing something to him and if so what was it?

(Plaintiff objects. Objection sustained, to which ruling of the court the defendant excepts.)

Your honor, we offer to prove by this witness that on the sixth day of March, the day before the homicide, that he met Alex Zane and had a conversation with him in which Alex Zane said that he would kill Jerry Wallace if he interfered with him in any way, and that these threats were communicated to this defendant.

(Plaintiff objects to the evidence. Objection sustained, to which ruling of the court the defendant excepts.)

141 SAMUEL COLLINS, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Defendant offers to prove by this witness that at a time shortly before the 7th of March last that he met Alexander Zane and had a conversation with Alexander Zane about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace, and that he said to this witness that he at one time made him look down the muzzle of a double-barreled shotgun and he wished he had killed him at that time, and that these threats were communicated to the defendant.

(Objected to by plaintiff. Objection sustained, to which ruling of the court the defendant excepts.)

142 MARY CROW, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Mrs. Crow, where do you live?
A. In the Seneca Nation.
Q. Is that near the Wyandotte Nation?
A. Yes, sir; just at the end of it.
Q. Did you know Alex Zane in his lifetime?
A. Yes, sir.
Q. Are you a member of the Wyandotte tribe of Indians?
A. Yes, sir.
Q. How long had you known Alex Zane prior to his decease?
A. Ever since when I was about six or seven years old.
Q. Had you ever lived in his family and knew him intimately?
A. Yes, sir; I have lived in his family.
Q. What relation, if any, was he to you?
A. Stepfather.
Q. Now, I will ask you if from that knowledge of him you have any knowledge of his going armed at all times?
(Plaintiff objects. Objection overruled.)
A. He had a butcher knife with him all the time.
Q. Where did he carry it, if you know?
A. He carried it around his belt.
Q. Now, did you a short time before the homicide, or the 7th of March, have a conversation with Alex Zane about Jerry Wallace?
A. No, sir.
Q. Or did you hear one?
A. Yes, sir; I heard one.
Q. You were present when Zane talked?
A. Yes, sir.
Q. Did he talk about Jerry Wallace?
A. Yes, sir.
Q. In that conversation did he threaten to do something to Jerry Wallace; if so, what was it?

143 (Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts.)

We offer to prove, your honor, by this witness, that at this time she heard Alex Zane say he intended to and would kill Jerry Wallace, and that she communicated these threats to Jerry Wallace.

(Plaintiff objects to the evidence. Objection sustained, to which the plaintiff excepts.)

Cross-examination by Mr. W. C. PERRY:

Q. Where are you living now?
A. At Split Log?
Q. Are you married?
A. No, sir.
Q. How long since you lived with Alex Zane and in Zane's family?
A. I lived with him about five or six years.
Q. How long since you quit living with him?
A. Ever since my mother died.
Q. When was that?
A. About eighteen years ago.
Q. You have not lived there since?
A. No, sir.
Q. That was before he married his present wife; and your mother died about eighteen years ago, and he married again, and you have not lived there since then?
No, sir.

144 E. H. BROWN, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Brown?
A. In the Indian Territory, Wyandotte Reservation.
Q. Do you know Jerry Wallace?
A. Yes, sir.
Q. How long have you known him?
A. Something over twenty years.
Q. What are your relations to him, if any?
A. Brother-in-law.
Q. Were you present at the preliminary hearing before Commissioner Daniels at Baxter Springs?
A. Yes, sir.
Q. *A*Past March?
A. Yes, sir.
Q. Did you hear the testimony of Ead Wallace on that occasion before the commissioner?
A. Yes, sir.
Q. Do you remember what he testified to with reference to where Zane stood, and which hand was upon the post at the time of the shooting?
A. Yes, sir.
Q. How did he testify down there as to that fact?
A. He testified that Mr. Zane had his right hand upon the post.

Q. Are you acquainted with the character or reputation of Jerry Wallace?

A. Yes, sir.

Q. At the time of the homicide with regard to peacefulness and quietness in the community where he lived?

A. Yes, sir, so far as I know.

Q. What was that character as to peacefulness and quietness, and particularly towards Alex Zane?

(Plaintiff objects. Objection overruled.)

145 Q. Were you acquainted with his character and reputation for peacefulness and good behavior?

A. Yes, sir.

Q. What was his general character and reputation for peacefulness and quietness?

A. Good.

Cross-examination by W. C. PERRY:

Q. Do you live near where Wallace lives?

A. I live, I expect, in the neighborhood of six or seven miles west of him.

Q. His land, or place where he lives, is right up against the State line?

A. Yes, sir.

Q. Where is yours?

A. Near the northwest corner a little bit.

Q. You live down on Grand River?

A. Near Grand River; yes, sir.

Q. Where is your trading post?

A. Seneca.

Q. How long have you lived down there, Mr. Brown?

A. Some twenty-odd years.

Q. How long have you known Wallace?

A. I have known him over twenty years.

Q. How long has he lived down there?

A. At different times, I suppose, about five years in the Indian Territory.

Q. Since he was married, right along?

A. Four years or a little more since he was married.

Q. Did I understand you to say you had heard his character for peacefulness and quietness discussed?

A. Yes, sir.

Q. Then it has been called in question by somebody has it?

A. Why, I presume so.

Q. It would not have been very likely to have been discussed or talked about if somebody had not doubted it?

A. I don't think so.

Q. You have heard of his having trouble and fusses and quarrels with people down there?

A. No, sir.

146 Q. What was it, then, that called up the question about his character; how did it come into discussion?

A. I couldn't tell you anything about that part of it.

Q. You are his brother-in-law?

A. Yes, sir.
Q. Married his sister?
A. Yes, sir.

Redirect examination by Mr. CHEESEMAN:

Q. Mr. Brown, were you acquainted with Zane in his lifetime?
A. I have been acquainted with Mr. Zane as far back as I can remember; we were raised together.
Q. Were you acquainted with his reputation for quarrelsomeness in the community where he lived?
A. No, sir; I couldn't answer that question.

147 LAFAYETTE LEWIS recalled.

Direct examination by Mr. CHEESEMAN:

Q. Mr. Lewis, were you acquainted with Alex Zane—with his general character for quarrelsomeness in the neighborhood where he lived?
A. Just by heresay.
Q. What was that character, with reference to quarrelsomeness, as being good or bad?
(Plaintiff objects. Objection overruled.)
A. Bad.
Q. Were you also acquainted with Jerry Wallace?
A. Yes, sir.
Q. And in the community in which he lived?
A. Yes, sir.
Q. What was his reputation and character as to being a peaceable and quiet man?
A. Very good.

Cross-examination by W. C. PERRY:

Q. You live over in Missouri, Mr. Lewis?
A. Yes, sir.
Q. You don't live nor have you lived in that neighborhood?
A. I live within three miles of Wallace.
Q. Over in the State?
A. Yes, sir; over in the line.
Q. You have heard the character of Wallace as being a quiet and peaceable man talked about, have you?
A. Yes, sir.
Q. What was the occasion of its being talked about?
A. This scrape that come up, I suppose.
Q. Up to that time you had not heard it discussed by anybody?
A. No, sir.
Q. And the same thing is true about Zane—up to that time you knew but very little about either one of them?
A. Very little.
Q. There is a very warm friendship between you and Wallace, is there not?
A. I don't know as there is.
148 Q. Do you know there is not? You ought to know what sort of terms you and he are on.
A. We are on good terms as far as it goes.

Q. Helped him some down there after he killed Zane?
A. In what way?
Q. In loading his gun.
A. No, sir.
Q. Who put the caps on the gun?
A. I don't know.
Q. Didn't you?
A. Never touched the gun.
Q. Was you standing there by him?
A. I was standing by my plow, and never assisted him in any shape; never touched the gun.

149 HUGH LESTER, recalled.

Direct examination by Mr. CHEESEMAN:

Q. Were you acquainted with the character and reputation of Jerry Wallace in the country where he lived for peacefulness and quietness?
A. Yes, sir.
Q. What was that reputation on March last?
A. It was good.
Q. Were you also acquainted with the character and reputation of Alex Zane for quarrelsomeness?
A. Slightly.
Q. What do I understand by that?
A. I had known Mr. Zane for more than a year.
Q. From what you have heard and what you know of him, what was his character for quarrelsomeness in that community?
A. It was bad.

Cross-examination by W. C. PERRY:

Q. You don't know of his ever having quarreled with anybody?
A. Not particularly, I don't; but then I never had any dealings with him.
Q. You never saw him quarrel with anybody?
A. No.
Q. And never knew of getting in any trouble with anybody?
A. Not there.
Q. Well, he is not in very much trouble here?
A. No; I would say not.
Q. You have heard of Wallace having quarrels?
A. I have not.
Q. Then you have never heard of either one of them having quarrels?
A. No, sir.
Q. And yet you say one had the reputation of being quarrelsome and the other peaceable?
A. I say as long as I have known Zane.
150 Q. How long have you known him?
A. About twelve months.
Q. And how long have you known Wallace?
A. About the same time.
Q. How far do you live from them?
A. About a mile.

Q. Now, is it not a fact, Mr. Lester, that up to the time Wallace shot Zane you never heard anything at all about either of them?

A. I never heard anything detrimental against Wallace and his character.

Q. Well, I say, is it not true that you never up to this shooting heard anything about either one of them as to their quarrelsomeness and troublesomeness?

A. I heard of things of the kind.

Q. You had heard they had some trouble or controversy about some land; was not that the extent of it?

A. I don't know whether that was all or not.

151 DAVID DUSHANE, being duly sworn on the part of the defendant to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Mr. Dushane, where do you live?

A. In the Cherokee Nation.

Q. Are you an Indian?

A. Yes, sir.

Q. What tribe do you belong to?

A. I belong to the Cherokees.

Q. Do you know Jerry Wallace, the defendant in this case?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have known him about twenty years, I guess.

Q. Do you know his character and reputation for peaceableness in the community where he lives?

A. Yes, sir.

Q. What is that character as to being good or bad?

A. Well, it has been good.

Cross-examination by W. C. PERRY:

Q. You live in the Cherokee Nation, I understand, Mr. Dushane?

A. Yes, sir.

Q. On the west and south side of Grand River?

A. Yes, sir.

Q. How far away from where Zane and Wallace lives?

A. Forty-five miles.

Q. How long have you lived down there?

A. Since the 2nd of March this year.

Q. Where did you live before that?

A. One and a half miles west of Seneca.

Q. How far is that from the Wyandotte Reservation?

A. About three-quarters of a mile from the line.

152 Q. How far from where Wallace lived?

A. I never knowed where Wallace was living. He lived south of us somewhere—southeast a little.

Q. Do I understand yo' to say or mean that you have heard Jerry Wallace's character as a peaceable, law-abiding citizen talked about, or do you mean to tell the jury you never heard anybody say anything about him?

A. I never heard anybody say anything about it.

Q. How do you know what the general opinion of the people down there was on that subject, then?

A. I never heard of anything.

Q. And it' because you have not heard of it—that is the reason you have arrived at the conclusion that it was good?

A. Yes, sir.

Redirect examination by Mr. CHEESEMAN:

Q. And from your knowledge of the man?

A. Yes, sir.

153 RADLEY, being duly sworn on the part of the defendant to testify the truth, the whole truth, andn othing but the truth, testified as follows:

Direct examination by Mr. CHEESEMAN:

Q. Where do you live, Mr. Radley?

A. Columbus, Kansas.

Q. What is your occupation or business there?

A. Under sheriff.

Q. Was that you occupation in March last?

A. Yes, sir.

Q. Do you know Jerry Wallace?

A. Yes; slightly.

Q. Were you present in and about the jail of Cherokee County, Kansas, at the time or about the time of the trial of the preliminary hearing before the commissioner?

A. Yes, sir.

Q. Did you see Jerry Wallace frequently in there?

A. Three times a day.

Q. Were you present on one or more occasions when he was sick and attended by the doctor?

(Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts.)

Q. You may state from the nature of the wounds (from what you saw), and the extent of it, and so on.

A. Well, he had been stabbed in the point of the shoulder blade in the back. In probing the *the* wound next day, after he was there in the jail, it went about an eighth of an inch—probably a little better. On the shoulder blade it was swollen very large, and also on his back here; and all around his stomach was all black and blue, as though he had beaten or hit with something—I don't know what.

Cross-examination by W. C. PERRY:

Q. You don't know where got that bruise?

A. No, sir.

154 Q. Was the cut made with a knife on his shoulder where there is no flesh?

A. No, sir.

Q. The wound was not more than a half an inch deep altogether?

A. Yes; it was a little better than that.

Q. How much?

A. It might have been 6, 6, 6—well, I couldn't say.

Q. The doctor looked after him and probed the wound down there at Columbus?

A. Yes, sir.

Whereupon defendant rests his case.

155 *Rebuttal testimony.*

EMMA DENMARK, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by W. C. PERRY:

Q. Where do you live?

A. In the Wyandotte Nation.

Q. What relation, if any, are you to Frank Denmark?

A. He is my father.

Q. Are you the Emma Denmark that was spoken of as being present at the time Jerry Wallace shot Alex Zane?

A. Yes, sir.

Q. Where were you when he fired the shot?

A. About twenty-five steps from Mr. Zane.

Q. And how many from Wallace?

A. Twenty-one, or about so.

Q. Describe to the jury how Mr. Zane stood.

A. He stood with his face to the east and his right hand on the post and his body north of the post.

Q. Where was his left hand?

A. Hanging down to his side.

Q. Did Alex Zane say anything to Wallace?

A. No, sir.

Q. Did he say to him "Damn you, I will kill you?"

A. No, sir.

Q. Who was standing where you were?

A. My father and Mr. Lewis.

Q. Where was Mrs. Wallace?

A. Close to her husband.

Q. Did you see the boy Noah Zane strike Wallace?

A. Yes, sir.

Q. Did he strike before or after he shot his father?

A. After he shot his father.

Q. When did you go down into the field to your father?

A. I don't know exactly what time, but I went down with Mrs. Wallace.

Q. Where were you when Jerry Wallace came up out of the timber?

156 A. By their house.

Q. State to the jury whether Wallace came to the house at all.

A. No, sir.

Q. Where was Mrs. Wallace when he came up to the barn to put up his team?

A. Around the house somewhere.

Q. Where did he go when he came up to the house?
A. I don't know just where.
Q. Were you living at their house at the time?
A. I was working there.
Q. Did Mr. Wallace have a shotgun?
A. No, he put his team in the barn and then went for the gun.
Q. Did he get the gun from the house?
A. No, sir.
Q. When he left the stable what direction did he go?
A. Didn't see which direction he went.
Q. How long after he came up to the barn was it that you and Mrs. Wallace went down into the field?
A. Probably half hour.
Q. Did you go into the field before he got there?
A. Yes, sir.
Q. How long?
A. Not very long.
Q. Had you seen him from the time he went into the barn until he went into the field.
A. No, sir.

Cross-examination by Mr. PRATT:

Q. What time was it when you went into the field that morning?
A. I don't know.
Q. About what time?
A. Somewhere about eight o'clock.
Q. How long after you had gotten down in the field till Jerry Wallace came down there?
A. I don't exactly know; it wasn't but a little while.
Q. Was you talking with your father?
A. I was standing by him and he was talking to Mrs. Wallace.

157 Q. You stated that you were about twenty-five steps from Alex Zane; that would make about seventy-five feet that was between you?

A. I don't know how many feet it was, it was twenty-five steps.
Q. Did you afterwards step the ground?
A. No, sir, my father and Mr. Lewis stepped it.
Q. When you first got down to the field, where was Noah Zane?
A. He was coming down to set up a post that Mrs. Wallace pushed down.
Q. Where did he go to?
A. He went and set up the post and stood by it.
Q. Was it east or west of Alex Zane?
A. West.
Q. About how far?
A. Don't know exactly.
Q. When Jerry Wallace came into the field and walked down towards where Alex Zane was standing, I will ask you if you noticed Noah Zane leave his post.
A. I didn't see him at the time he left the post.
Q. I will ask you if he was not standing by the side of Jerry Wallace when the shot was fired.

A. Noah was not quite to him when the shot was fired.
Q. Noah was not?
A. No, sir he was not quite.
Q. Positive about that, are you?
A. Yes, sir; he was not quite.
Q. How far away was it?
A. I don't know exactly.
Q. Who was in the field at that time?
A. Me and my father, Mr. Lewis, Mr. Bailey, Ead Wallace, Mr. Lamont, Noah Zane, Mr. Zane, and Mr. and Mrs. Wallace.
Q. How many of the parties were up near Alex Zane?
A. Me and my father and Mr. Lewis.
Q. And Noah Zane?
A. Yes, sir.
Q. Was Jerry Wallace standing between you and Alex Zane?
A. Yes, sir.
158 Q. When Noah came up near Wallace did he go to his back or in front of him?
A. At his back.
Q. Now, the time that Noah came up and went to the back of Jerry Wallace was about the time the shot was fired?
A. He didn't go to his back until after the shot was fired.
Q. How far from him did he stop?
A. I don't know.
Q. I will ask you if your attention was not more particularly directed to Jerry Wallace and Alex Zane.
A. Yes, sir; more than I was at Noah.
Q. Noah might have struck him with that knife and you not have seen him?
A. No, sir; I saw him strike him. It was after he fired.
Q. Did you see him with a tomahawk?
A. No, sir.
Q. Not at all?
A. No, sir.
Q. How long did you remain there after this shot was fired?
A. I don't know.
Q. About what time was it, then, as near as you can guess?
A. It was not more than five or ten minutes.
Q. Did you see Noah Zane go to him?
A. Yes, sir.
Q. Did you see him come back?
A. Yes, sir.
Q. What did he have in his hand?
A. I don't know.
Q. Don't know whether it was a tomahawk or hatchet?
A. No, sir.
Q. And yet you were twenty-five steps away?
A. Yes, sir.
Q. I will ask you if you saw Noah Zane stoop down and take anything from his father's body.
A. Yes, sir; I did.

Q. And yet you say you don't know what he had in his hand?
A. No, sir; I don't exactly know what it was.
Q. Now, after he had taken that from his body, he then came back towards you?
A. Yes, sir.
Q. How near you?
159 A. He di'n't come very far from his father, and didn't come very close to the rest of us.
Q. Did he come up to Jerry Wallace at that time?
A. He was *was* quite a ways from him.
Q. Did he stop?
A. I don't remember.
Q. Did you see his hands?
A. Yes, sir.
Q. You don't know what he had in his hands?
A. Not exactly.
Q. What part of the body did he take this hatchet from?
A. I don't know; it was somewhere about his waist, but I don't know for sure where he got it from.
Q. Was it in his left hand or right hand?
A. I don't know.
Q. How long had you been living at Jerry Wallace's?
A. A week, or a little more.
Q. How many rooms in their house?
A. Two.
Q. Did you stay over there at that house?
A. Yes, sir.
Q. There might have been a gun there and you might not have seen it?
A. There might, but if there had been one in the house I would have seen it.
Q. You think during your week's stay there you saw everything in the house?
A. Yes, sir.
Q. What gate did he go through when he come to the house?
A. I don't know exactly.
Q. Did you see him before he got to the barn?
A. Yes, sir.
Q. What direction was he coming from?
A. From the north.
Q. You didn't see him when he passed through the gate?
A. Yes, sir; and I spoke to him.
Q. Now, what gate was it?
A. It was the big gate.
Q. Did you see him when he entered the field again?
A. Yes, sir.
Q. What gate did he come through then?
A. No gate; he crawled under the fence.
160 Q. At what point?
A. I don't know exactly, but it was *but it was* opposite to where the rest of us stood.
Q. This gate was east and north of where you stood, was it not?

Q. It was north and west; the big gate was west of the house.
Q. About how many feet or how many yards did he come from that gate before he come over to the field?
A. He didn't go through the gate; he come under the fence.
Q. You saw him at the residence?
A. Yes, sir; that is, I saw him when he come to the barn.
Q. From the plowing in the field?
A. Yes, sir.
Q. Then he come through the fence and come where Alex Zane was?
A. Yes, sir.
Q. There is a road round there?
A. Yes, sir.
Q. How long was he up there to the house?
A. He didn't go to the house.
Q. How long was he at the barn?
A. Just long enough to put his team in the barn.
Q. And you saw nothing more of him until he came down into the field?
A. No, sir.

Redirect examination by W. C. PERRY:

Q. Noah was running around crying?
A. Yes, sir; he was kneeling down by his father and crying.
Q. Did you see a man by the name of Houston or Collins?
A. I didn't see them at the shooting, but saw them shortly afterwards.
Q. Where were they?
A. Behind the building where Mr. Wallace kept his corn.
Q. How far was that from the house?
A. A little ways.
Q. North?
A. East of the house.
Q. In the brush?
A. Close to the brush.

161 Q. That was when you first saw them?
A. Yes, sir.
Q. How long after the shooting?
A. I don't know exactly.
Q. Had they taken the body away then?
A. They had just started away with it.
Q. That was the first you saw of Houston or Collins?
A. Yes, sir.

162 Mrs. ISABEL DENMARK, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by W. C. PERRY:

Q. What is your given name?
A. Isabel Denmark.
Q. Are you the mother of Emma Denmark?
A. Yes, sir.

Q. And the wife of Frank Denmark?
A. Yes, sir.
Q. Where were you the day that Zane was shot?
A. At home.
Q. And where was your house?
A. It was some where near a half mile from Mr. Wallace's.
Q. What direction?
A. It was northeast.
Q. And what direction from Collins' house?
A. Almost straight south.
Q. Where did the road run that went from Wallace's house up to Collins' house in reference to your house?
A. They generally went right through the timber across. There was a road that run that way.
Q. The morning that Wallace shot Zane, did you see Wallace?
A. Yes, sir.
Q. Which way was he going when you first saw him?
A. Towards Collins' house.
Q. Did you see him after that?
A. Yes, sir.
Q. Which way was he going then?
A. Close to the corner of my house, going home.
Q. The first time that he passed there, did he have a gun?
A. No, sir.
Q. Did he have a gun as he came back?
A. Yes, sir.
Q. Did you have any talk with him?
A. Just spoke; that was all.
163 Q. Did you hear a shot fired shortly after that?
A. No, sir.
Q. When did you first ascertain that he had shot Alex Zane?
A. In the afternoon.
Q. Are you sure it was the same day that you heard of the shooting that you saw him going from Collins' house with the gun?
A. Yes, sir.
Q. What gait was he traveling?
A. Very fast.
Q. When he came back, was he walking fast?
A. Yes, sir.
Q. How long from the first time you saw him going towards Collins' house until you saw him coming back?
A. It was a very few minutes.
Q. How far was it from your house?
A. About a hundred yards.
Q. Did you see Collins that morning?
A. Not at that time.
Q. Did you see him before?
A. I don't know. I saw him so much that I didn't pay any attention.
Q. Did you see Houston?
A. Not at that time.

Cross-examination by Mr. CHEESEMAN:

Q. You say the distance from Wallace's house to your house was about half a mile?

A. As near as can tell.

Q. There is a road running from Wallace's house by your house to Collins' house?

A. Yes; it is a kind of a neighborhood road that runs into the main road at our gate.

Q. I will ask you if prior to this time you speak of if this road has not been closed up by brush being thrown in it?

A. No, sir; we have lived there a couple of years, and there is no brush in it.

Q. And you don't remember seeing Houston and Collins that day?

A. No, sir; not at that time.

Q. If you saw them at that time you have forgotten it?

A. Yes, sir; for I paid no attention to it.

164 Q. What time of morning was it that Jerry Wallace passed your house?

A. I don't know.

Q. How long after he passed your house going down before he returned?

A. Well, a few minutes.

Q. Did you say anything to him?

A. We passed the time of day.

Q. Said nothing to him as he come back?

A. I didn't say anything to him as he went by the first time, but as he came back I asked him if he was going to shoot anyone.

Q. I will ask you, Mrs. Denmark, if that was not on the 6th day of March, 1895?

A. No, sir.

Q. Where was you on the 4th day of March?

A. I don't know; I suppose I was at home, where I ought to be.

Q. Don't know where you were on the 5th?

A. No, sir.

Q. Do you know where you were on the 6th?

A. Yes, sir; I was at home.

Q. Did you see Jerry Wallace on that day?

A. I saw him the day the shooting was done.

Q. Did you see him on the 6th, 7th, or 8th?

A. I saw him on the 7th.

Q. You say you didn't hear any shot fired?

A. No, sir; I didn't.

Q. What time of the afternoon of that day was it that you heard of this homicide?

A. It was some time in the afternoon.

Q. What time in the afternoon?

A. About two o'clock.

Q. Then he passed your house between eight and nine o'clock?

A. Yes, sir.

165 Mr. LOCKLAND, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Where is your home, Mr. Lockland?
A. Wyandotte Reservation.
Q. How long have you lived there?
A. Twenty-four years.
Q. How long have you been acquainted with Alexander Zane?
A. About twenty-two years.
Q. Did you and he live practically neighbors during that time?
A. Yes, sir.
Q. Do you know what his character and reputation was in that country as to being a peaceable and quiet citizen?
A. It was good.
JUDGE. Do you know what it was?
A. Yes, sir.
Q. Do you know Jerry Wallace?
A. Yes, sir.
Q. Do you know what his general reputation was?
A. Never heard it discussed one way or the other.

Cross-examination by Mr. CHEESEMAN:

Q. Have you ever heard Mr. Zane's reputation discussed?
A. Well, I don't know as I ever heard it discussed particularly.
Q. Did you ever hear of his having difficulty with a gentleman by the name of ?
(No answer.)

166 Mr. MAYFIELD, being duly sworn on the part of the plaintiff to testify the truth, the whole truth, and nothing but truth, testified as follows:

Direct examination by Mr. PERRY:

Q. Mr. Mayfield, where do you live?
A. In Seneca, Missouri.
Q. Did you know Alex Zane in his lifetime?
A. No, sir; I did not.
Q. Do you mean you had no personal acquaintance with him?
A. No, sir.
Q. How far did he live from where you lived?
A. I suppose five or six miles.
Q. Did you know his general reputation as a quiet and peaceable citizen?
A. No, sir; I did not.

167 Mr. BRODERICK, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Where do you live, Mr. Broderick?
A. Three miles south of Seneca.

Q. In the State or Territory?
A. Territory.
Q. How far from the line?
A. About two hundred yards.
Q. Did you know Alex Zane in his lifetime?
A. Yes, sir.
Q. How long have you known him?
A. I got acquainted with him in 1864 or '65.
Q. What was he doing then?
A. He was a soldier.
Q. Have you known him ever since then?
A. A part of the time I have not.
Q. How long altogether did you live neighbor to him?
A. About thirteen years.
Q. Did you know his reputation in that locality as to being a quiet and peaceable citizen?
A. Yes, sir.
Q. Was it good or bad?
A. Good.
Q. Did you know Jerry Wallace?
A. Yes, sir.
Q. How long—or how much acquaintance had you with him?
A. I never had no business with him; I have known him when I met him for five or six years.
Q. Did you know anything about his character?
A. It was good, so far as I knew.
Q. You never heard he had got into trouble?
(Defendant objects. Objection sustained.)

168 Mr. GRIFFITH, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by W. C. PERRY:

Q. Where do you live, Mr. Griffith?
A. Newton County, Missouri.
Q. How far is that from where Alex Zane lives?
A. Two miles and a half.
Q. How long had you known him?
A. About nineteen years.
Q. Had you lived neighbor to him all that time?
A. Yes, sir; we lived on my place and he on his.
Q. Did you know his reputation as a quiet and peaceable citizen?
A. Yes, sir.
Q. Was it good or bad?
A. Good.

Cross-examination by Mr. CHEESEMAN:

Q. Did you ever hear of his getting into trouble with a man by the name of——
(Objected to. Objection sustained.)

169 Mr. THOMPSON, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. Where is your home, Mr. Thompson?
A. Newton County, Missouri.
Q. Did you know Alex Zane in his lifetime?
A. Yes, sir.
Q. How far did you and he live apart?
A. Within two or three miles.
Q. How long have you known him?
A. Twenty two or three years.
Q. Do you know what his general reputation was in the country in which you and he both lived as to being a peaceable and quiet citizen?
A. Yes, sir.
Q. What was it?
A. It was good.

170 Mr. BAILEY, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. PERRY:

Q. Where is your home, Mr. Bailey?
A. In Newton County, Mo.
Q. Did you know Alex Zane in his lifetime?
A. Yes, sir.
Q. How far did you and he live apart?
A. Five or six miles.
Q. Were you well acquainted with him?
A. Yes, sir.
Q. How long had you known him, Mr. Bailey?
A. Twenty-three years.
Q. Did you know his general reputation in the community there as being a peaceable and quiet citizen?
A. Yes, sir.
Q. What was it, good or bad?
A. Good, sir.

Cross-examination by Mr. CHEESEMAN:

Q. You say you had known Mr. Zane about nineteen years?
A. Twenty-three years.
Q. On terms of intimacy all that time?
A. Yes, sir; pretty well all the time.
Q. Do you remember of his having had any difficulty at the Indian agency?
A. No, sir.
Q. You never heard of that?
A. No, sir.
Q. Do you know W. H. Nesbit?
A. No, sir.
Q. Did you ever hear of an occurrence at the land agency, and on account of that some trouble grew out of it with a man by the name of Nesbit?
(Objected to. Objection sustained.)

171 PETER MUDEATER, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. PERRY:

Q. Q. Pete, you belong to the Wyandotte tribe, I believe, don't you?
A. Yes, sir.
Q. Do you occupy any official position down there in your country?
A. Yes, sir.
Q. What?
A. I am chief of the Modoc affairs.
Q. Have you been on the police force down there?
A. Yes, sir.
Q. How long?
A. Twelve or thirteen years.
Q. Are you now?
A. No, sir.
Q. Were you chief of the police?
A. Yes, sir.
Q. How long?
A. Eight or ten years.
Q. You knew Alex Zane?
A. Yes, sir.
Q. How long?
A. Ever since I can remember anything.
Q. Did you know his general reputation there in that country as to being a quiet and peaceable citizen?
A. Yes, sir.
Q. Was it good or bad?
A. It was good.
JUDGE. His general reputation, what people said about him, was it good or bad?
A. It was good.
Q. Do you know the spot where this trouble occurred between Jerry Wallace and Alex Zane?
A. Yes, sir.
Q. Do you know Mr. Power, the man that surveyed the land?
A. Yes, sir.
Q. Do you know Major Doane?
A. Yes, sir.
Q. Who is he?
A. Our Indian agent.
Q. Do you know where this line of fence is that Alex Zane started to build?
A. Yes, sir; I was there at the time.

172 Q. Did you have anything to do with the locating or helping to locate the line between Jerry Wallace's land and Alex Zane's land?

(Defendant objects. Objection sustained.)

173 JOHN LAMONT, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by W. C. PERRY:

Q. Are you the John Lamont the witnesses have spoken of as being with Bailey and Eli Wallace on the morning that Zane was shot?

A. Yes, sir.

Q. State, if you know, whether Alex Zane, or how Alex Zane was standing, what his position was, where his hands were at the time and just before the time that Jerry Wallace shot him.

A. He was standing with his right hand on the post, facing the east, and a trifle north, to the best of my knowledge.

Q. Were you where you could see him?

A. Yes, sir.

Q. Was he north or south of the post?

A. He was north of the post.

Q. And facing the east?

A. Yes, sir.

Cross-examination by Mr. CHEESEMAN:

Q. You came down there that morning with Mr. Zane as one of the parties who came into the field?

A. I came down with Mr. Zane and Mr. Bailey.

Q. And did you go across the field?

A. I went across the field, yes, sir; from where they went into the field.

Q. From the east end?

A. Yes, sir; to the State line.

Q. And did you remain at the State line or near there until the shooting occurred afterwards?

A. Yes, sir.

Q. Did you pass by Jerry Wallace in the field going across it?

A. Yes, sir.

Q. What, if anything, was said by him?

(Plaintiff object for the reason that it is not cross-examination. Objection overruled.)

174 Q. What, if anything, did he say to Alex Zane?

A. He said, "Alex Zane, if this is your force take it and get out of here," and then he called to him again and said, "Alex Zane, if this is your force take it and get out of here immediately."

Q. Now, shortly after that, did Wallace take his horses from the plow and leave the field?

A. Yes, sir.

Q. While he was gone did you have a conversation with Alex Zane?

A. Yes, sir.

Q. What, if anything, did Mr. Zane say to you?

(Plaintiff objects. Objection sustained, to which ruling of the court the defendant excepts.

Defendant asks for this man as a witness. Objected to. Objection sustained, to which ruling of the court the defendant excepts.)

Q. Q. When you say, according to your best knowledge, that that was the position he stood in, what do you mean by that?

A. I mean that was to the best of my knowledge.

Q. Do I understand by that that you are not exactly positive where he stood?

A. Yes, sir.

175 Mr. ROBINSON, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by Mr. PERRY:

Q. Mr. Robinson, do you live in Wyandotte Reservation?

A. Yes, sir.

Q. How far from Alex Zane?

A. Nine or ten miles.

Q. How long have you known him?

A. About eight years.

Q. Were you acquainted with his general reputation in the community where he lived as a quiet and peaceable man?

A. Yes, sir.

Q. Was that reputation good or bad?

A. Good, so far as I know.

176 Major DOANE, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination by W. C. PERRY:

Q. State to the jury your name and what your occupation is.

A. George S. Doane; I am agent in the Wyandotte Reservation.

Q. How long have you been Indian agent there?

A. Since February 8th, 1894.

Q. Did you know Alex Zane?

A. Yes, sir.

Q. Did you know his general reputation in the community where he lived as to his being a peaceable, quiet citizen?

A. No, sir.

Q. Do you know the place where this homicide occurred?

A. Yes, sir.

Q. How far is that from the agency?

A. About five miles.

Q. Do you know where the line of fence was that Zane had commenced to build that morning?

A. Yes, sir.

Q. Do you know whether that line of fence was on the land which had been allotted to Jane Wallace or Julia Zane?

A. I know from what Mr. Power said.

(Defendant objects. Objection sustained.)

Q. Who is Mr. Power?

A. He was sent there by the Government to establish lines wherever surveys had to be made for allottments.

Q. When was that?

A. In May, 1894.

Q. Did you go with Mr. Power to survey this allotment of Jane Wallace's and Julia Zane's?

A. No, sir.

Q. Do you know that Mr. Power was employed by the Government for that purpose?

Yes, sir.

Q. Was he so employed at your instance?

A. Yes, sir.

177 Q. Did Alex Zane counsel with you as agent in reference to to this particular line?

A. Yes, sir.

Q. Did you, as agent in charge of agency and in authority over the Indians, there tell him where the line was?

(Objected to by defendant. Objection sustained.)

178 Mr. POWER, being duly sworn on the part of the Government, testified as follows:

Direct examination by Mr. W. C. PERRY:

Q. What is your occupation, Mr. Power?

A. Civil engineer and surveyor.

Q. Were you employed some five or six years ago, at the time the Wyandotte lands were allotted, in the line of your occupation by the Government?

A. I was.

Q. State whether you ran the lines between the allotments of Jane Zane or Wallace and the allotment of Julia Zane.

A. I did.

Q. Was that at the time when the land was actually allotted or set apart so much to each individual Indian?

A. Yes, sir.

Q. By whom were you employed?

A. The Government.

Q. To whom did you report?

A. To the agent; and my work was done under his instructions.

Q. To whom was the result of your work sent?

A. Through him to the Department at Washington.

Q. After that, and in 1894, I will ask you if you were employed by the Government in connection with that same line?

A. Yes, sir.

Q. What time?

A. In June, July, and August.

Q. Who at that time was agent?

A. Major Doane.

Q. What did you do?

A. I took in corners that had been lost from the first that I had put in in 1888.

Q. There was a man here—I forgot his name—said there was a corner moved three or four rods. Mr. Lester said you moved the southwest corner stone three rods. What was there about that?

A. It was the section line corner. It was lined in the ground in the side hill and under the stone, and we had some trouble to find it,

179 and it was out of position possibly five or six feet to the east. I said to some of them to take the stone up, and I indicated where

it should be placed on the line running north, as well as the line running east, and it was moved probably five or six feet west.

Q. Then did you run the line at the same place that you did in 1888?

A. Yes, sir.

Q. Did you then have the official field notes?

A. Yes, sir.

Q. Did you make a map of the country?

A. I did.

Q. Have you got it?

A. Yes, sir.

Q. Where? [Witness here produces map.]

Q. When was this made?

A. 1892.

Q. This is the original?

A. Yes, sir; that is a copy of the outline. It is a copy of the original survey from the map in the office.

Q. Did you see Jerry Wallace in the summer of 1894 when you located this line?

A. Yes, sir.

Q. Did you tell him where the line was?

A. I told his wife.

Q. Did you see him?

A. Yes, sir.

Q. Did you have any talk with him about it?

A. I had with the two of them. I went to the house and told them what I came there for, and they remarked that they had had it surveyed, and they didn't need to survey it again, and I wished them to go along with me and be present when the work was done, and they declined to do so.

Q. Did Ead Wallace help you in that work?

A. He did. I don't remember the names of those who helped me. They were all strangers to me then, but he was one that helped me, as well as that man Lester.

Q. You saw an enclosure there with a fence around the field, did you?

A. Yes, sir.

180 Q. Where was Wallace's house with reference to this fence?

A. Well, the north fence——

Q. Where did this line run with reference to that fence and house? [Hands witness map to tell from.]

A. The house stands about in there [indicating] and the fence passes down on that side of the house [indicating].

Q. Where was the line between the two allotments of Julia Zane and Jane Wallace in reference to that fence?

A. That is it in the red line [indicating].

Q. Where was the north fence in reference to that line?

(Defendant objects.)

Q. Did you make this map?

A. Yes, sir.

Q. You have examined it, have you?

A. Yes, sir.

Q. Is it correct?

A. Yes, sir.

Q. Where is the south fence of Wallace's in reference to the new line?

A. The south fence came around this point [indicating] and run up this way over in here; there was no fence on that line.

Q. Where was the fence, the south fence of that enclosure; on Jane Wallace's land or Julia Zane's land?

A. On neither one of them; it was down in the Seneca Nation, below the Wyandotte line.

Q. What did you do when you located that line—what marks did you make, if any?

A. I drove stakes in, and there was one of the stakes on the east; that was on the State line, and that was there just the same as it was when it was placed there in 1888; the one on the west was gone. I put one there in 1888, and one in 1892, and one in 1894, and I put another in that same corner.

Q. Now, after you located that line, what, if any, report did you make to the Indian agent?

181 A. I made a report that I had established the lines just as they were when I established them in 1888.

Q. That line was correct?

A. Yes, sir.

Q. How far from the south line of the Wyandotte Reservation was the south line of Jane Wallace's land?

A. I can't remember that; I took the notes from the record and from that section corner we spoke of, and I measured the proper distance and put that corner in the division line.

Q. There was a line?

A. Yes, sir; there are two fractions.

Q. I will ask you to look at the map and then look at the description on this patent, and tell, if you can, to the jury whether this patent of Julia Zane's contains those fractions or lots which lie immediately north of the south line of the reservation?

A. It does.

Q. This line runs between the land allotted to Julia Zane immediately north of the south line of the Wyandotte Reservation and the land allotted to Jane Wallace; and the south line of that Wallace land formed the north line of the land allot'ed to Julia Zane?

A. Yes, sir.

Cross-examination by Mr. CHEESEMAN:

Q. Mr. Power, I will ask you if this is not an exact copy of that document you had in your possession?

A. Yes, sir.

Q. I will ask you if at the time that this patent was made to Jane Zane that before that time you had made an allotment of land to her which is indicated in this map?

A. Yes, sir.

Q. Now, I will ask you if this patent—if the description in this

182 patent—does not correspond and are not identically the same with the description of her allotment on there?

A. Yes, sir.

Q. Now, sir, this patent was issued on that?

A. Yes, sir.

Q. And, as you understand it, supposed to cover that land, conveying it to her. Now, sir, by what authority do you change? I will ask you another question, if Julia Zane's land on this map is not directly north of the forty which was allotted to Jane Zane?

A. That originally was so.

Q. I will ask you if that is not so by this map?

A. Yes, sir.

Q. By what authority, sir, do you change the allotment to Julia Zane and put it down south; who had it done?

A. At the request of Alex Zane it was done.

Q. What patent?

A. The one that the district attorney has.

Q. Do you pretend to tell this jury that the Government, after issuing them, goes to work and issues to another party a portion of this same land?

A. No, sir.

Q. Have you ever seen any records of any such facts?

A. No, sir.

Q. I will ask you when you made this survey you didn't make a reserve of the south side of Jane Zane's land?

A. No, sir; I made no selection.

Q. I will ask you if the map don't show it?

A. It shows two fractions there.

Q. Have you ever had a conversation with Mr. S. B. Patterson with reference to the Missouri line, which is the eastern boundary line of this land?

A. I never have.

Q Did you ever have a conversation with him as to the south line of this reserve was?

A. No, sir.

Q. And in that conversation did you tell him that you didn't know where the south and east line was?

183 (Plaintiff objects for the reason that witness said he never had a conversation with him. Objection sustained.)

Where do you say the house was on this little plat?

A. The house was in the neighborhood of that distance there [indicating].

Q. Mark the place on this plat where their house was, if you please.

A. It was right in there [indicating].

Q. Now, mark the place on this map where Mr. Zane was proposing to run that fence?

A. From the corner [indicating], which was the southeast corner of the Jane Zane or Jane Wallace allotment, and the northeast corner of the fractions referred to as having been allotted to Julia Zane.

Q. Would that take in a portion of Jane Zane's allotment as shown by this map?

A. It wouldn't take any of it.

Q. Now, I want to ask you, Mr. Power, if you recollect a conversation had with Mr. Patterson, the surveyor of Neosho, Missouri, down at Seneca, about three or four years ago, at the time these allotments in the Wyandotte Reservation were being made, in which he asked you if you knew where the line was relative to the division line, being the line between the State of Missouri and the Indian Territory, and if in that conversation you didn't say to him that you didn't know where it was?

A. I have no recollection of any conversation of the kind. I had no difficulty in finding the line down there, and I don't see why I should say that. I might have spoken of some certain point that I hadn't been to.

Q. Will you testify that you didn't so speak of it?

A. I have no recollection of it whatever; and as I said before, it might have been at some point that I know nothing about and had not been to.

The line is defined on the ground.

184 Q. Mr. Power, how far south of the house which you located on this plat is the proposed line which Zane was running?

A. I couldn't answer that.

Q. About how far, in your judgment?

A. Well, I suppose it was between four and six hundred feet, somewhere along there in that neighborhood; it is something I never paid any attention to.

Q. I believe you located the house on lot two according to this map, did you not?

A. Yes, sir.

Cross-examination by Mr. PERRY:

Q. This map shows that there is a strip of land south of Mrs. Wallace's land, and it shows that it was never allotted to her.

A. It never was allotted to any one until Mr. Zane made application to the Department to change it for the one he had previously taken for Julia, his daughter.

Q. That was the business you were sent out here for?

A. A part of it.

Q. And that was what you did?

A. Yes, sir.

185 Major DOANE recalled.

Direct examination by Mr. PERRY:

I offer this plat, showing that lots four and five, section 33, was certified and conveyed to Julia Zane, and I also offer these two maps that were identified.

Q. Is the witness last on the stand the one that was sent out by the Government to locate the land?

A. Yes, sir.

Q. Did he report to you as agent as to the lines of Julia Zane's land?

A. He did.

Q. On that report did you make a change in Julia Zane's allotment?

A. Yes, sir.

Q. Did you see the fence that Alex Zane started to build after that?

A. Once.

Q. Was it on the line between the allotments of Mrs. Wallace and Julia Zane?

A. Supposed to be; yes, sir.

Cross-examination by Mr. CHEESEMAN:

Q. Major, that is your signature, is it not?

A. Yes, sir; that is mine.

Q. I will ask you if this is a letter directed to Mr. Jerry Wallace?

A. Is it so stated there?

Q. Yes, sir.

A. I guess it is, then.

Q. Just look at it and see.

A. [Witness takes letter and reads]. Yes, sir.

Q. Requiring him and his wife to appear before the agency down there in relation to this land?

A. Yes, sir.

Q. I will ask you if you were present when the matter was heard?

A. I was in and out; yes, sir; it came before the Indian court. There were three judges; one was sick, and he got Mr. Armstrong to take his place.

186 Q. Who was the attending parties in that complaint?

A. Alex Zane and Mrs. Jerry Wallace.

Q. That she should be put in possession of her allotment?

A. Yes; as her patent called for.

Q. Was it the lands described in this patent?

A. Yes, sir.

Q. Now, do you know as a fact that the land described in this patent and upon this plat are the same?

A. That [indicating], and that [indicating], and that [indicating] are.

Q. Now, do you know as a fact that the proposed line to be run by Zane on the 9th day of May would cut across right through about here?

A. No, sir; I don't, and for that reason I sent for the surveyor.

187 PETER MUDEATER recalled.

Direct examination by Mr. PERRY:

Q. Were you with Mr. Power when he located the line between Jane Wallace's land and Julia Zane's?

A. No, sir.

Q. Did he show you where the line was?

A. I never was down there with him.

Q. Do you know where the line is that he located?

A. No, sir; I don't think I can say exactly where it was.

Q. Did you have anything to do with Alex Zane and the locating of that line, to tell him where the line was?

A. We went down there to locate the line, but a storm came up and we went home.

Q. Do you know where that line was?

A. No, sir; I don't.

188 ELI WALLACE recalled.

Direct examination by Mr. PERRY:

Q. Did you see Mr. Collins or Houston at the time of the shooting?
A. Not at the time.
Q. How long after was it when you saw them?
A. I never saw Mr. Houston at all.
Q. Did you see Collins?
A. Yes, sir.
Q. Where was he when you first saw him?
A. At Wallace's house.
Q. How long was that after the shooting?
A. I judge it was maybe twenty minutes.
Q. Had you started off with his body?
A. Yes, sir; after we had started.
Q. Were you one of the men that helped Mr. Power locate the line between Jane Zane's allotment and Julia Zane's?
A. Yes, sir; I was there.
Q. Do you know where that line is?
A. I know where he said it was.
Q. Were you with him the summer of 1894 when he located it?
A. Yes, sir.
Q. What did you do?
I carried the chain.
Q. Now, I will ask you to tell the jury where it was, in reference to that line so located by Mr. Power, that you and Zane and these other men were building the fence?
A. Why, that was the line that we were at work on.
Q. Were you north or south of the line that Mr. Powers located?
A. A little south of the line.

Cross-examination by Mr. CHEESEMAN:

Q. You say you were one of the chain men?
A. Yes, sir.
189 Where did you start in?
A. Well, I don't just remember where we started in.
Q. Did you start at the proposed southwest corner of this land of Wallace's?
(Question objected to by the judge as he was only the chain carrier.)
A. Of course I was not interested and never paid any attention to it.
Q. I will ask you if you recollect running a north and south line and stopping at a clump of hickory trees?
A. Yes, sir.
Q. Did you and Zane and Hugh Lester have a conversation there?
A. We were talking some.
Q. I will ask you if before you got there Zane carried the chain?
A. He did carry it a little piece.
Q. Now, I will ask you if in that conversation he made use of this language in presence of Hugh Lester and yourself, and while Mr. Power was up on the hill, "I want to gain four feet off of this in order to make my corner come where I want it?"
A. No, sir; I don't recollect of it.

Q. I will ask you if he said to both you and Hugh Lester, "Boys if you ever tell of this I will break your heads with a stick?"
A. I never heard any such talk, sure.

190 NOAH ZANE recalled.

Direct examination by Mr. W. C. PERRY:

Q. Noah, did your father have any wound on his body or his hand other than the one you told about yesterday?
A. No, sir.
Q. Just point on me where that wound was on the breast.
(Defendant objects, as it is incompetent and not rebuttal testimony. Objection overruled.)
Q. Where was it?
A. Right here somewheres. [Indicating on his own breast.]
Q. Was there any shot in either one of your father's hands?
A. No, sir.
Q. Sure of that?
A. Yes, sir.

191 *Rebuttal on the part of the defendant.*

HUGH LESTER.

Examined by Mr. CHEESEMAN:

Q. Mr. Lester, won't you please tell the jury what Mr. Zane said about running that last line?
A. He started at the southwest corner and was running north, and he took the chain in going down, and when we got it run to the corner we all set down, myself and Mr. Ead Wallace and Zane. Mr. Power was back up on the hill looking at some corner or something, and he says, "Boys, the reason I want to take this chain down here is because I know what I would have to gain in order to gain four feet coming down here to make my corner come where I want it, and now," he says, "If you boys ever tell or say anything about this I will break your heads with a stick," and me and Wallace just laughed at him and didn't reply to it.
Q. I will ask you if in that conversation he made any other threats as to where Jerry Wallace's land would be when he got through with it?
(Plaintiff objected. Objection overruled.)
A. He did. He said when he got through with the land he wouldn't leave Jerry Wallace a garden spot; that he could haul it away in a wagon box.

Cross-examination by Mr. PERRY:

Q. You were paid by the Government to do that work?
A. No, sir; Mr. Zane paid me.
Q. You knew what Mr. Powers was doing there?
A. Yes, sir.
Q. Why didn't you tell this man of it?
A. Well, Mr. Zane made the expression after he had run the line.
Q. You saw him after that?
A. It was none of my business.

192 Q. You thought it was all right to keep quiet?

A. I thought it was none of my business, if they didn't say anything about it.

Q. You were working for Zane?

A. Yes, sir; I was carrying that chain.

Q. Do you mean to say that Zane was paying the chain carriers?

A. He paid me, sir.

Q. And you let that thing go without saying anything about it?

A. I did, simply because it was none of my business.

Q. Wasn't it your business to be honest?

A. It was my business to not raise a disturbance between neighbors.

Did you prefer to keep quiet about it and let it go without saying anything about it?

A. I did at that time.

Q. When did you tell it first?

A. After this shooting business took place.

Q. And who did you tell it to?

A. I don't remember.

Q. Did you tell anybody in connection with the Government?

A. I didn't see any of them.

Q. You wouldn't have had to have gone very far to have seen them?

A. I suppose I could have found some man interested in it.

Q. Do you believe in that sort of business?

A. I didn't believe anything about it. I didn't think it was any of my business. I never expressed my opinion about it.

Q. You had no opinion about it?

A. If I did I never expressed myself.

Q. Ead Wallace was there at the time?

A. Ead Wallace and myself were the men that carried the chain.

Q. Did you act honest that day?

A. Yes, sir; and I believe Ead did.

Q. And yet you let Zane do a thing of that sort and never said a word about it?

193 A. I didn't consider it any of my business to raise trouble about it.

Q. Well, don't you know that if the line was fairly measured on one side it would have been simply stupid for Zane to incorrectly measure it on the other side?

A. I don't know anything about surveying.

Q. You don't know enough to understand that a piece of land has got to be measured off on both sides in order to make a survey?

A. No, sir; I didn't think about it.

Q. You don't know of any reason why you didn't tell it?

A. Only it was none of my business.

Q. It was not because Zane said he would knock your head off with a stick?

A. I was not afraid of Mr. Zane, most assuredly.

Q. What did he say that for?

A. Just in fun, I guess.

Q. Don't you know he was in fun about the other?

A. No, sir.

Q. Well, didn't you know if he was not in fun that he was going to rob Wallace?

A. I don't know what his intention was.

Q. What do you think he intended to do that for?

A. I think he wanted to make his corner where he wanted it.

Q. If he wanted to make his corner at that particular point, you know he was taking land from Wallace and his wife.

A. No, sir; I thought he wanted to get the line through correctly.

Q. Then you didn't think he wanted to do anything wrong?

A. Not at that time.

Q. And the fact that he said he wanted to gain that four feet was a matter that did not arouse your suspicion?

A. Only as he said that he wanted to gain four feet in order to make his corner come where he wanted.

194 EAD WALLACE recalled.

Examination by Mr. CHEESEMAN:

Q. Mr. Wallace, who paid you for doing this work, at the time Mr. Lester speaks of?

A. Mr. Zane.

Mr. POWER recalled.

Examination by Mr. PERRY:

Q. Mr. Power, there has something been said here to the effect that Alex Zane stated that he wanted to gain four feet on every chain in order to bring one of the corners of Julia's land to a particular spot; if he did so, that is, if he gained four feet in every chain length, what effect would that have on the location by you of the line?

A. Not any. I should have gone right back over it to have seen where all the corners were.

Q. What was the object of having the chain carried?

A. Simply to test it.

Q. Did these two lines between these two allotments give Jane Wallace all the land she was entitled to?

A. Yes, sir.

Q. What was the difference last summer?

A. None.

Cross-examination by CHEESEMAN:

Q. You didn't go back over the land, did you, to see whether he had gained four feet?

A. No, sir; I had no necessity of going back.

Q. Mr. Power, who paid you for this work?

A. The Government.

195 Q. I will ask you if Mr. Zane paid you any money for this work?

A. He didn't, sir.

Q. Was you paid by him to the amount of $25 to do this work?

A. No, sir.

S. R. PATTERSON.

Examination by Mr. CHEESEMAN:

Q. Did you have any conversation with Mr. Power over in Seneca over four years ago?

A. Yes, sir.

Q. In one of those conversations did you ask him if he knew where the line was between Missouri and the Indian Territory?

A. Yes, sir; at the point of the town of Seneca and the Indian Territory.

Q. What reply, if any, did he make to it?

A. My recollection is that he didn't know, not having his notes with him.

Cross-examination by Mr. PERRY:

Q. A point on the line that was north of the Wyandotte Reserve?

A. Yes; away up above the post-office.

Q. He said he didn't know exactly where the line was?

A. Yes, sir.

Q. What point on the State line were you and Mr. Power talking about?

A. Well, it was the line between Newton County at that point of the city of Seneca and the Indian Territory, and the reserve that was right west of Seneca.

Q. Is the Quapaw Reserve between that point you were talking of and the Wyandotte Reserve?

A. There are a number of reserves.

196 Q. How far was it to the point on the State line that you were talking to Mr. Powers about north of the Wyandotte Reserve?

A. It was ten miles, I should think.

JUDGE. Give his full answer.

A. He said at that point he didn't know exactly where the line was, for the reason that he didn't have his notes with him.

JERRY WALLACE.

Examination by Mr. CHEESEMAN:

Q. Mr. Wallace, you heard Mrs. Denmark's testimony about meeting you on the morning of the 7th?

A. Yes, sir.

Q. Did you meet her?

A. No, sir; I did not.

Q. Was you anywhere near the vicinity of her house that morning?

A. Not till after this trouble.

Thereupon the defendant rests his case. And this was all of the evidence given or offered upon said trial.

Thereupon the defendant asks the court to give the following instructions, which the court refused to do, to which ruling of the court the defendant then and there duly excepted:

197 *Defendant's instructions.*

The defendant requests the court to instruct the jury: That the defendant is presumed to be innocent until proven guilty.

And before you can find him guilty of any offense under the indictment you must be satisfied from the evidence, beyond a reasonable doubt, of his guilt, and if there is a reasonable doubt in your minds as to whether his guild has been satisfactorily shown, then you must acquit him. And you are further instructed that the term reasonable doubt does not mean every vague or conjectural doubt, but it is a substantial doubt, a reasonable hypothesis, rising from the evidence, or lack of evidence inconsistent with the theory of defendant's guilt; and you must be convinced as jurors when you would be convinced as men in affairs pertaining to the graver transactions of life, and you should doubt as jurors when you would doubt as men in the graver transactions of life. If, therefore, in considering the evidence in this case you find in your minds a reasonable doubt as to the guilt of the defendant, and this doubt is such a one as reasonable, prudent men acting in the graver transactions of life would make you hesitate and pause, then you should hesitate and pause as jurors, and if such a reasonable doubt arises in your minds as to the guilt of the defendant, then you must acquit him.

The defendant request' the court to instruct the jury: That murder is where a person, with sound memory and discretion, unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense or aforethought, express or implied. Malice is an essential element under the statute, and a specific, deliberately formed intention unlawfully to take life, either as expressly shown by the evidence or as implied by law, is a constituent element of the crime. To constitute this malice there must be shown that condition of the mind which shows the heart regardless of duty and fatally bent on mischief towards another person; and it is imperative that this malice exist at the time of the homicide, for if the killing be not committed out of present malice it is not murder.

If, therefore, you find and believe from the evidence that on the 7th day of March, A. D. 1895, that Alexander Zane, the deceased, was unlawfully trespassing upon the premises of defendant, to wit, his home; and if you further find from the evidence that he was wrongfully and unlawfully building a fence on the land of his daughter, who was and is the wife of the defendant; and if you further find and believe from the evidence that in building said fence upon Mrs. Wallace's land he was intending to take from and deprive defendant's wife of a portion of her land and appropriate the same to his own use; and if you further find and believe from the evidence that, in attempting to carry out this purpose, he came upon the premises of defendant's wife, with a force of men, teams, and material, passing by defendant, who was plowing in the field and who ordered him to leave the premises; and if you further find from the evidence that defendant, after demanding that deceased leave the premises, left his horses and went to the house, returning with his gun to the near presence of the deceased; and if you further
198 find from the evidence that after defendant had gone to his house the deceased, Alexander Zane, showed to John Lamont, a witness

present, a tomahawk which he had concealed on his person, remarking that that was what the Indians used; and if you further find from the evidence that Alexander Zane, the deceased, had Indian blood in his veins; and if you further find and believe from the evidence that prior to this time there was ill feeling on the part of Alexander Zane against defendant, and that he had frequently made threats that he, Zane, would kill defendant; and if you further find that these threats, or any of them, had been communicated to defendant; and if you further find from the evidence that Alexander Zane was a quarrelsome man; and if you further find and believe from the evidence that defendant was a citizen of good character, peaceable in his character and deportment towards deceased; and if you further find from the evidence that when defendant came with his gun to the near vicinity of the deceased the deceased was again ordered to leave the premises; and if you further find from the evidence that just about this time the deceased made a threatening movement, raising his arm quickly to his side as if to draw a weapon, saying, Dam' you, I will kill you; and if you further find from the evidence that at this time defendant's eyes were weak and his eyesight poor; and if you further find from the evidence that just about this time that defendant was struck in the back with a knife by some person behind him, and at about the same instant was warned to look out; and if you further find from the evidence that at this particular time defendant believed, or had reason to believe, that his life was in danger, or that great bodily harm was intended to him, and that acting upon such belief he fired his gun, inflicting upon deceased a gun-shot wound; and if you further find and believe from the evidence that at the time thereof, or afterwards, and from the effects of such gun-shot wound Alexander Zane died, then you must find that at the time defendant fired the shot his condition of mind was not such as shows his heart to be regardless of duty and fatally bent on mischief towards Alexander Zane, and he must be acquitted.

The defendant requests the court to instruct the jury: That homicide is always excusable when committed in the actual and necessary defense of the life or person of the slayer; but in order to maintain this defense it must appear that the defendant when he fired the fatal shot was acting under the reasonable belief that he was in imminent danger of his life, or feared great bodily harm from the deceased, and that it was necessary to fire the fatal shot in order to avoid the danger to his life, or great bodily harm, which was apparently imminent; that this existence of the reasonable apprehension of actual or apparent danger is to be considered from the standpoint of the defendant at the time of the homicide; and not from the standpoint of the jury in the light of the facts proved, and that the guilt of the accused must depend on the circumstances as they appeared to him.

If, therefore, you find and believe from the evidence that at the moment the defendant fired the fatal shot he believed, or was acting under the reasonable belief that he was in imminent danger of his life, or feared great bodily harm from the deceased, or those with him, and
199 fired the fatal shot to avoid such danger apparently imminent, then you must find that the defendant acted in self-defense, and he is entitled to your verdict of acquittal: And you are further

instructed that to maintain the plea of self-defense under such circumstances the danger need not be actual, if the accused acted on a reasonable appearance and belief of danger.

The defendant requests the court to instruct the jury: That homicide in the defense of property is excusable, when necessary to defeat or prevent the commission of a forcible or atrocious felony thereon.

If, therefore, you find and believe from the evidence that on the 7th day of March, A. D. 1895, Alexander Zane went upon lands in the peaceable occupancy and possession of the defendant, and commenced to build a fence through and across the same, that such acts made him a trespasser, and the defendant had the right to resist such trespass and eject him; and if you further find and believe from the evidence that in resisting such trespass it became necessary for the defendant to kill Alexander Zane, in order to prevent the commission of a forcible or atrocious felony by the deceased, then your verdict must be for the defendant, acquitting him of the crime charged.

The defendant requests the court to instruct the jury: That the question whether under all the circumstances there was grounds for a reasonable belief in the mind of the defendant that necessity existed for taking the life of Alexander Zane is one for the determination of the jury, in the solution of which the condition of both of the parties at the time is a legitimate subject for consideration, and in determining what is sufficient ground for a reasonable belief in defendant's mind that such necessity existed, you are instructed that, if at the moment just before defendant fired the fatal shot, he believed, or had reason to believe, that his life was in danger from deceased, or from those who were with him, or feared great bodily harm from him or them, then you are instructed that the defendant was not required to wait until the deceased, Alexander Zane, gained a position equal to defendant's or until deceased, Alexander Zane, was upon equal terms with defendant, but that he might lawfully slay him just as soon as it appeared to the defendant that a mortal combat was inevitable, in which he might lose his life, or suffer great bodily harm from Alexander Zane, or those with him.

200 The defendant requests the court to instruct the jury: That in order for defendant to sustain his plea of self-defense it is not necessary for him to show that Alexander Zane actually had a deadly weapon. It is sufficient to show for defendant in that respect that the conduct of Alexander Zane was such as to induce a reasonable belief that he had one. If, therefore, you find and believe from the evidence that at the time defendant fired the fatal shot the conduct of Alexander Zane was such as to induce a reasonable belief in the mind of defendant that Zane had a deadly weapon, then you must find for the defendant on his plea of self-defense.

The defendant requests the court to instruct the jury: That the defendant has introduced evidence of his good character, which has not been controverted by the Government; that such evidence is to be considered by you, and is not merely of value in a doubtful case, but will of itself sometimes create a doubt, when without it none could exist.

If, therefore, you find and believe from the evidence that at all times prior to the fatal shot by defendant he was peaceable in his deportment

and demeanor towards Alexander Zane, then you should acquit him, provided you find that his good character towards Alexander Zane has been proven to your satisfaction.

The defendant requests the court to instruct the jury: That the question of the sufficiency of the evidence adduced by defendant to show that he committed the homicide in self-defense is one to be determined by you, and the defendant need not show, either beyond a reasonable doubt or by a preponderance of proof, that he killed Alexander Zane in self-defense; it is sufficient if the evidence to that effect raises a reasonable doubt in your minds.

201 Thereupon the court gave the following instructions to the jury, to which instructions the defendant then and there duly excepted and excepts.

202 Gentlemen of the jury, it now becomes my duty to give you in charge the law, as the court conceives it to be applicable to this case. In the first place I will define to you what is murder under the laws of the United States. Murder is the unlawful killing of a human being in the peace of the Government with malice aforethought, either express or implied. The killing, of course, must be done by a person of discretion and of sound mind; but every person is supposed to be of sound mind, unless the contrary shall appear from the evidence. So the question as to this defendant being a man of discretion and of sound mind is not involved in this case. Then murder is the unlawful killing of a human being in the peace of the United States with malice aforethought, either express or implied.

Malice, as you perceive, is of two kinds. There are different methods of showing it or determining it. Express malice is that deliberate intention of mind formed previous to the killing, and existing at the time of the killing, to unlawfully take away the life of a human being, which is made manifest by external evidence and is capable of proof. This may include preparation for the killing, such as arming himself. Any other act which shows his intention and determination to do the killing, which is shown by evidence and proof, may well be considered as evidence of express malice.

However, it is not necessary in order to show malice, or to show that malice exists, that these things be shown, because malice is implied where no considerable provocation appears to cause the deed, or where all the circumstances of the killing manifestly and plainly show a wicked disposition, then malice is implied.

It is essential, in order to constitute murder, that it be done with malice aforethought, and existing at the very time of the killing. It need not have existed for any particular length of time, so that it actually existed before the killing, and at the time of the killing, and if the defendant in this case took away the life of Alex Zane with malice aforethought, then he is guilty of murder.

The defendant by his counsel excepted to the giving of this instruction, for the reason that it is uncertain and ambiguous and does not properly define murder.

The next grade of homicide is manslaughter. Manslaughter is the unlawful killing of a human being in the peace of the State, in the heat of passion and without malice, either express or implied, and without

deliberation. Manslaughter must be voluntary upon the sudden heat of passion, and that passion caused from some provocation apparently sufficient to make the passion irresistible. The difference—the main element of difference between murder and manslaughter—is that manslaughter is the unlawful killing without malice and without deliberation, and upon the sudden heat of passion, and that passion must be caused by some provocation apparently sufficient to make the passion irresistible. A man is not permitted to get into this kind of a passion upon a slight provocation; he is not permitted and justified to do this, and the offense is not reduced from murder to manslaughter if a man should take away
203 the life of a human being on some slight provocation; not at all, but the passion must be of such a nature as to make it apparently irresistible, and he loses control of himself to the extent that his passion overrides his better judgment. When these circumstances concur and a man takes away the life of a human being, under these circumstances the killing is reduced from murder to manslaughter, and his life shall not be the forfeit of his act.

Now, I have endeavored to make plain to you these two grades of homicide; that is all that comes within the jurisdiction of the courts of the United States.

In the States they have various degrees of murder and manslaughter, but in our jurisprudence we have but one degree of murder and one degree of manslaughter, but that I have endeavored to explain to you.

The defendant by his counsel duly excepted to the giving of this instruction for the reason that it is uncertain and ambiguous, and does not properly define manslaughter.

But again, it is also my duty and my pleasure to say to you that every killing is not necessarily murder nor manslaughter, because under some circumstances a man may, in defense of his own person, be justified or excused in taking the life of a human being, or to prevent another from taking his life, or to prevent another from inflicting great bodily injury upon him, he may take the life of that other human being and be justified in so doing. He may also in the defense of his home prevent any one who unlawfully attempts to enter it or violate it in any way; he may arrest that kind of a trespass even to the extent of taking life if necessary. He may also defend his property against anyone who manifestly attempts by violence or surprise to commit a felony upon it. Under these circumstances he is justifiable in taking human life.

Now, a few suggestions as to the defense of his own person. I said to you that he was justified in taking the life of a human being when that person is endeavoring, or apparently is, about to take his life, or to inflict great bodily harm upon him. But in order to be justified in taking human life under these circumstances, there are qualifications. The danger to his own life must be present, imminent, and pressing. Not only that, but the attitude of the deceased at the time of the killing must be such as would convince (as shown by the testimony) a reasonable man that he was about to lose his own life or to receive great bodily injury and harm at the hands of the deceased. Under such circumstances he is justified in taking human life.

The defendant excepted to the giving of this instruction at the time for the reason that it is ambiguous and does not correctly and legally define the right of self-defense.

Another element that enters into it is this: Not only must the danger be pressing and imminent to a man of reasonable intelligence and prudence and information, but he must be actuated by a sense of that danger, and a fear of that danger, in taking human life, and not be
204 actuated by any spirit or feeling of revenge. If the attitude of the deceased was as I have described, and the defendant was not actuated entirely and alone by a sense of danger but by a spirit of revenge, he is not justified.

This instruction was duly excepted at the time, for the reason that it is vague, uncertain, and misleading.

Another element is, that a man who takes away the life of a human being under these circumstances must not himself have been the aggressor, or if he was the aggressor, it must be apparent before the killing that he declined any further combat. In other words, a man is not justified in taking the life of a human being if he is the aggressor, if he puts himself in the attitude that it is apparent to the other man that his life is in danger, then the man in self-defense, to protect himself, kills, and unless the attitude of the deceased warrants, it will not matter, it will not justify. He must have been the aggressor, or if he was not the aggressor it must appear that he had declined all further combat.

The defendant excepted to this instruction, for the reason that it is misleading and not the law.

Now, as to the question of this place where the killing is said to have been done.

To trespass upon real estate is, at best, but a misdemeanor; it is not a felony, and under no circumstances is a man justified in taking the life of a human being for simply trespassing upon his land. If he is trespassing and they get into an altercation, it is not sufficient to reduce the killing from murder to manslaughter. That must be taken into consideration by the jury. Or, if they get into an altercation when one attempts to prevent the trespass and something occurs that puts his life in imminent danger before he acts, and such danger would be apparent to a reasonable man, and then he is compelled in self-defense to do the killing, he may act. But the mere fact of trespass itself does not justify the killing or reduce it from murder to manslaughter. Now, so much for that part of it.

To the giving of this instruction the defendant duly excepted at the time, because it was misleading and misled the jury.

Gentlemen of the jury, this defendant, as all other defendants, is clothed about with the presumption of innocence until his guilt is shown by the testimony in the case, and unless the Government has established the fact of his guilt by the testimony so as to satisfy you beyond a reasonable doubt, then it is your duty to acquit him. In other words, the defendant is entitled to the benefit of all reasonable doubt—doubt that arises in the testimony in this case, even to the extent that if, after weighing all the evidence, you still have a reasonable doubt of his guilt at all, of either murder or manslaughter, it will be your duty to acquit him. On the other hand, if, after weighing all the evidence you have an abiding conviction of his guilt, it is your duty to convict; and
205 when I speak of a reasonable doubt, I mean a doubt arising on the testimony, and nothing else. I do not mean any suppositious, illogical, far-fetched doubt, but a doubt arising on the testimony,

such a doubt as would prevent you from acting in the most important affairs of your life. This is the kind of a doubt that I speak of when I say that he is entitled to all reasonable doubt.

The defendant, by his counsel, duly excepted to this instruction at the time, for the reason it was misleading to the jury, and not a correct or legal definition of reasonable doubt.

Gentlemen, you are the sole judges of the testimony of all the witnesses, subject to this suggestion, however, on the part of the court, that you are not to disregard the testimony of any witness, unless you have some good reason, or from some other testimony in which you place more confidence, believe that he is mistaken, before you are entitled to disregard his testimony. You may judge of the credibility of the witnesses by their demeanor on the witness stand, by the means they have had of acquiring their knowledge of the facts to which they have testified, and especially of any interest they may have in the result of their verdict.

Subject to these suggestions, gentlemen of the jury, and in fact all together, I merely give you these suggestions to aid you, but all together you are the sole judges of the testimony and of the credit to be given to the testimony of any witness, or of all the witnesses. With the punishment of this case you have nothing to do. You are simply to say, is the defendant guilty of murder in the first degree? If not, is he guilty of manslaughter? If you have a reasonable doubt as to his guilt of murder you are not justified in finding him guilty of murder. Then, if you have a reasonable doubt as to his guilt of manslaughter, you must acquit him. For this doctrine follo's him through that degree also, and you are not justified in finding him guilty at all if it exists. You have nothing to do with the punishment; that is with the court. The punishment, if murder, is death by hanging; if manslaughter, it is imprisonment in the penitentiary at hard labor.

As to the condition of these parties, their land quarrels and their troubles, except such as bear upon this case, you have nothing to do; it is simply for you to say from the testimony, and the law given you by the court, is the defendant guilty of murder or manslaughter, or is he not guilty.

The defendant duly then and there excepted at the time, for the reason that it is misleading and does not properly present the law.

206 To the giving of which instruction the defendant duly excepted, and to each and every part, and to each and every one of the parts excepted thereto, and to each and every of said instructions, and that exceptions are noted at the bottom or conclusion of each instruction herewith filed and made a part of this bill of exceptions.

207 Now, inasmuch as the above and foregoing matters and things do not appear of record, the defendant presents this as his bill of exceptions and prays that it may be settled, signed, and allowed as such, which is accordingly done, and upon his motion it is ordered to be made a part of the record in this case.

JNO. A. WILLIAMS, *U. S. Dist. Judge.*

AUG. 19, 1895.

I hereby acknowledge service of this bill of exceptions, and certify that I have examined it and made such changes as I thought proper, which have been acceded to by the attorney for the defendant.

I therefore now state that I see no objection to the bill of exceptions, and know of no reason why the judge should not sign it.

W. C. PERRY, *United States Attorney.*

(Endorsed:) No. 81. The United States of America, plaintiff, vs. Jerry Wallace, defendant. Bill of exceptions. Filed 30th day of Aug. 1895. Geo. F. Sharitt, clerk. By S. P. Mosher, dep. clerk.

208 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA)
vs.
JERRY WALLACE.)

Now, on this 31st day of August, A. D. 1895, came the defendant, Jerry Wallace, by his attorney, James H. Pratt, and files herein and presents to the court his petition, praying for the allowance for the writ of error intended to be urged by him.

Praying also that a transcript of the record—and record and papers upon the judgment herein was rendered, duly authenticated—may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the court does allow the writ of error, and orders a suspension of judgment which shall operate as a supersedeas until the case thus appealed is finally determined by the Supreme Court of the United States of America.

CASSIUS G. FOSTER,
Judge of the U. S. District Court for the of the Judicial District of Kansas.

(Endorsed:) 81. The U. *States* of America vs. Jerry Wallace. Order allowing writ of error and suspension of judgment. Filed Aug. 31, 1895. Geo. F. Sharitt, clerk.

209 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the district court of the United States of America, for the district of Kansas, third division, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings of said court in the case of The United States, plaintiff, against Jerry Wallace, defendant, No. 81 in said court. I further certify it is the original citation and writ of error are returned herewith and made a part of this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 12th day of September, A. D. 1895.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Indorsement on cover:) Supreme Court U. S., clerk's office. Received Sep. 16, 1895. Case No. 16021. Term No., 731. Jerry Wallace, plaintiff in error, vs. The United States. Kansas, D. C. U. S. Filed September 16th, 1895.

Office Supreme Court U. S.
FILED.
DEC 23 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JERRY WALLACE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 731.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JERRY WALLACE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 731.

MOTION TO ADVANCE.

The plaintiff in error was indicted on May 6, 1895, in the district court of the United States for the district of Kansas, for having murdered one Alexander Zane at the Wyandotte Indian Reservation. He was found guilty on trial and sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the plaintiff in error and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JERRY WALLACE, *Plaintiff in Error,*
vs.
THE UNITED STATES, *Defendant in Error.*
No. 731.

In Error to the District Court of the United States for the District of Kansas, Third Division.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN D. HILL,
FORT SCOTT, KANSAS.
JAMES H. PRATT,
NEOSHO, MISSOURI.
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

..UNITED STATES..

****

JERRY WALLACE, *Plaintiff in Error,*
vs.
THE UNITED STATES, *Defendant in Error.* } No. 731.

****

In Error to the District Court of the United States for the District of Kansas. Third Division.

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STATEMENT.

At the May term, 1895, the defendant was indicted in the District Court of the United States for the District of Kansas, third division, under Section 5,339, revised statutes of the United States for the offense of murder in the first degree.—pp. 23 and 3.

At the adjourned term, on June 13th, 1895, a motion to quash the indictment was filed—p. 3, because defective in that.

1. That the same does not state facts sufficient to constitute an offense under the law.

2. That it does not state in the first or jurisdictional part that the grand jury empanelled, sworn and charged to inquire of offenses committed within the third division of the United States court for the district of Kansas had jurisdiction to inquire into the offense at the place where it is afterwards stated to have been committed in the substantive or charging part of the same.

3. It does not so state that it was so annexed to the third division of the state of Kansas, which said motion the court on the 14th day of June, 1895, overruled, to which action of the court in overruling said motion the defendant by his council then and there excepted at the time.—p. 3.

The defendant thereupon filed his plea to the jurisdiction of the court.—pp. 4, 5 and 6.

The defendant in error thereupon filed a demurrer to the plea in bar, which barring formal parts is in words and figures as follows: Comes now the United States and demurs to the plea in bar filed by the defendant and as a ground of demurrer say that said plea is insufficient in point of law and fact, and fails to show any reason why defendant should not be tried on the indictment now pending in this court against him.—p. 6. Demurrer sustained.—pp. 6 and 7. To which ruling and decision of the court the defendant, Jerry Wallace, by his counsel, then and there excepted and still excepts.—p. 7.

The defendant having moved to quash the indictment

and filed a plea to the jurisdiction of the court unsuccessfully and without admitting the validity of the indictment or the jurisdiction of the court announced ready for trial under protest and without waiving any of his rights.

On the 14th day of June, 1895, the defendant was tried and convicted. Motion in arrest of judgment and for new trial were filed and overruled.—pp. 13, 14 and 15.

The defendant by his council then and there excepted to the ruling of the court and still excepts.—p. 16.

And thereupon the defendant was sentenced to be hanged by the neck until dead.

The defendant filed a bill of exceptions in due time and case appealed to this court.—pp. 22, to 120 inclusive.

ERRORS ALLEGED.

1. The court erred in sustaining the demurrer to the defendants plea to jurisdiction.—p. 19.

2. The court erred in correcting the journal entry of the Clerk of this court made June 6th, so as to make it read "The Judge being in *the city but* unable to attend at this day court was adjourned *by the marshal* until nine o'clock to-morrow morning."—p. 19.

3. That the court erred in denying the motion to quash the indictment and for the discharge of the defendant supported by the plea to the jurisdiction.—p. 19.

4. The said court erred in requiring the defendant to go to trial in this action on Thursday June 13th, 1895, for the reason that the panel was made up as aforesaid, and the further reason that after the said panel of regular jurors summoned and made up as aforesaid, the court directed

that a copy of the list of jurors so as aforesaid returned should be served upon the defendant's attorneys, instead of requiring service to be made upon the defendant, which was not done, and two days have not elapsed from any service of the list of jurors before the defendant was required to go to trial.—p. 19.

5. The court erred in excluding a portion of Samuel Collin's testimony, a witness on the behalf of the defendant who, being asked, "Are you acquainted with Alex Zane's character for quarrelsomeness answered, "Yes sir, well, not to say I do myself, only what I have heard from others, is all I know about it." The question was then asked, "I will ask you what that character and reputation was in the community for quarrelsomeness? To this question, the plaintiff objected and the court sustained the objection. The witness should have been permitted to answer this question, because a man's reputation is established by what others say about him, and the defendant should have been permitted to prove that Alex Zane was a quarrelsome man so that the jury would be better enabled to judge what Wallace had to fear from Zane, and if he was known to be a quarrelsome, turbulent man. Witness further testifies that Alex Zane rode in a buggy with this witness, Collins, from Seneca home and when asked the question, "Did he make any threats toward Jerry Wallace?" The court refused to permit the witness to tell what these threats were. This testimony will be seen on page 83 of printed record.

6. In the testimony given by the defendant as a witness in his own behalf upon the trial, on page 65 of the

record, he says that he was afraid of this party of men, and especially of Alex Zane himself, and did not feel safe without some protection. This is why he took the gun into the field. He also testified that he had heard of the threats of Alex Zane, and these different threats had been communicated to him. Then the question was asked, "What were those threats about ?" and he answered, "He would kill me," at this point the plaintiff objects and the court sustained the objection, and the defendant was not permitted to go on and state to the jury what these other threats and communications were that had been made to him. He was further asked the question, "You may state to the jury what imminent danger you believed yourself to be in at that time ?" so that the jury could be able to determine from his position, and condition of mind, caused by previous threats, what Zane would do, if the defendant believed himself in imminent danger, he should have been permitted to so state to the jury, and why he so believed it.—65. printed record.

7. Also in refusing to permit the defendant to state to the jury the frequent threats that Alex Zane had made against his life and that these threats had been communicated to him, and especially to state that what Zane had said and what he had done to cause the fear in the mind of defendant, Jerry Wallace, that Zane would take his life, or do him some great bodily harm. Also that Zane had at one time driven Jerry Wallace out of his house at the point of a shot gun. All of these facts should have gone to the jury to better enable them to determine the reasonable-

ness of the grounds, of the fear that existed in Jerry Wallace's mind at the time the shooting occurred, or just previous theteunto.—65 and 66 printed record.

8. Also in refusing to permit the defendant, Jerry Wallace, to state to the jury the result of the controversy over the title to this land in the indian courts as it had been submitted to that indian court and went to show what had been done there and this court had decided that this land belonged to Wallace's wife, and if he believed they were the rightful owners of this land, and had a right to protect it, it would have a tendency to take away the idea of premeditated malice on the part of Jerry Wallace.—p. 71 and 72, printed records.

9. Also in refusing to permit the defendant to exhibit to the jury the photograph of the field taken after the homicide. It had a tendency to prove the location of the grounds and convey to the minds of the jurors the position of the parties as it would be pointed out by the witness.—65 to 72 printed records.

10. Also in refusing to permit the plat of this land to go to the jury showing the location of the house, the well and all important points made by Mr. Patterson, the surveyor, who surveyed the land, as the testimony showed that he, (Patterson,) had surveyed this land and it was the land claimed and owned by Jerry Wallace, and tended to prove the land belonged to the defendant and his wife.—65 to 72 printed record.

11. Also in refusing to permit the witness, R. C. Patterson to testify to the threats made by Alex Zane the day

before he went upon this land, that he intended to go down there and build a fence across this land and that if he, Jerry Wallace, the defendant fooled with him he would kill him. And further, that Zane had brought whisky for the purpose of stimulating himself, and that of the men he was to take down the next day upon this land, for the purpose of taking possession of it and building a fence across it, and forcing Wallace and his family away from it.—p. 79 printed record.

12. Also in refusing to permit the testimony of Charles Luke to go to the jury wherein the defendant offered to prove by this witness that the day before the killing, while in the town of Seneca, Alex Zane said he was going down to build a fence across Wallace's land and if Jerry Wallace interfered with him he would kill him, or shoot the blind son of a bitch, and that these threats were communicated to Jerry Wallace —pp. 79 and 80 printed record.

13. The court also erred in refusing to permit the testimony of Mrs. Alice Sargent to go to the jury wherein she states or offered to state and prove that Alex Zane while in the kitchen of this witness said that he would kill Jerry Wallace and that he had a knife that he was carrying for that purpose and that she had communicated these threats to Jerry Wallace.—pp. 80 and 81, printed record.

14. The court also erred in refusing to permit Hugh Lester, a witness on behalf of the defendant, who testified that he helped survey the land in dispute between Zane and Wallace, and that Power, the surveyor, had permitted Zane to move one of the monuments and that Zane had carried the chain while surveying this line and that he said the

reason he wanted to carry the chain was that he wanted to gain four feet on each chain so as to make his corner where he wanted it.—pp. 81 and 82, printed record.

15. The court also erred in excluding the testimony of Samuel Taylor, who testfied to having a conversation with Alex Zane on the 6th day of March, the day before the homicide, on the road from Seneca to his house, the following question was asked, "In that conversation did Zane say anything about Jerry Wallace as to doing something to him, and if so, what was it?" Objected to and objection sustained. The defendant then made the offer of proof that the day before the homicide Alex Zane had a conversation with this witness in which he said he would kill Jerry Wallace if he interfered with him in any way and that these threats were communicated to this defendant.—p. p. 82 and 83 printed record.

16. The court also erred in refusing to permit the witness, Samuel Collins to testify in regard to the threats made by Alex Zane against Jerry Wallace, and that these threats had been communicated to Jerry Wallace. Defendant offered to prove by this witness that a short time before the 7th of March he met Alex Zane and had a conversation with him about Jerry Wallace, and that in that conversation he threatened to kill Jerry Wallace and said to this witness that at one time he made this defendant look down the muzzle of a double barrelled shot gun, and he wished he had killed him at that time.—p. 83, printed record.

17. The court also erred in refusing to permit Mary Crow, a step-daughter of Alex Zane, a witness on behalf of

the defendant, to testify in regard to the threats Alex Zane made against the life of Jerry Wallace to her, and that she communicated these threats to him, which was as follows: "What relation, if any, was Zane to you?" "Step-father," "Now I will ask you from that knowledge of him have you any knowledge of him going armed at all times?" "He had a butcher knife with him all the time." "Where did he carry it, if you know?" "He carried it around his belt." "Did you a short time before the homicide on the 7th of March have a conversation with Alex Zane about Jerry Wallace?" "No sir." "Or did you hear one?" "Yes, sir, I heard one." "Were you present when Zane talked?" "Yes sir." "Did he talk about Jerry Wallace?" "Yes Sir." "In that conversation did he threaten to do something to Jerry Wallace, if so, what was it?" Plaintiff objects and the objection sustained. Defendant offered to prove by this witness that at this time she heard Alex Zane say he intended to kill Jerry Wallace, and that she communicated these threats to Jerry Wallace.—p. p. 83 and 84.

ARGUMENT.

The testimony shows that Alex Zane was an Indian, who lived in the Wyandotte Reservation in the Indian Territory. That at the time of the allotment of the lands belonging to this tribe of Indians, his daughter, Jane Wallace, had allotted to her the following described lands, to-wit: Lots numbered two, (2,) and three, (3,) and the northwest quarter of section thirty-three, (33,) in township twenty-seven, (27,) north of range twenty-five, (25,) east of the Indian meridian in the Indian Territory.

That she and her husband, Jerry Wallace, took possession of the land and was living on it and farming the land. A bitter feeling sprang up between the family of Jerry Wallace and his father-in-law, Alex Zane. Alex Zane wanted to get possession of a part of the land that had been broken up and farmed by Jerry Wallace for his minor daughter, Julia Zane. The fact is he wanted possession of the land for his own benefit, but could get it no way only by claiming the title to this allotment to be in his minor daughter, Julia. Two surveys had been made to this land in order to settle the boundery line, Wallace claiming it was in one place and Zane in another, and on the morning of March 7th, 1895, Alex Zane determined to take forcible possession of that portion of the land he claimed belonged to his minor daughter, and went over there with a drunken posse of men with wagon, posts and wire, and was proceeding to build a fence over this land and take possession of it, which resulted in causing his death by being shot by this defendant, Jerry Wallace, Wallace believing the land belonged to his wife and that he had a right to protect his own property. While plowing in his field peaceably, Alex Zane came, with three others, singing and hollowing and making a great noise for the purpose of annoying and provoking and doing all they could to intimidate Jerry Wallace, while forcibly taking possession of his land, and he, Jerry Wallace, taking in the situation and knowing he was outnumbered, and knowing he was unable to defend himself against these enroachments and the insults they were heaping upon him and his wife, went to the house and got his

shot gun and came back to the field, and he and his wife entreated them to leave the place and make no further disturbance. Alex Zane had a tomahawk concealed upon his person. Wallace went up to within fifteen feet of Zane for the purpose of remonstrating with Zane and inducing him peaceably to go away, which Zane refused to do, and while thus talking to Zane and knowing the dexterity with which an Indian could wield a tomahawk and brain a man at that distance, and while talking to Zane to get him to go home and leave the premises, Zane made, as he supposed, a motion to draw a revolver or the tomahawk, accompanied with a threat to kill defendant, and, believing himself in imminent danger, he fired the fatal shot that killed Alex Zane.

Did the court err in sustaining the demurrer to the defendant's plea to jurisdiction? By referring to section 671, revised statutes United States, it provides:

"If neither of the judges of the circuit court, is present to open any session, the marshal may adjourn the court from day to day until a judge is present, provided neither of them attend before the closing of the fourth day after the time appointed for the commencement of the session, the marshal may adjourn the court until the next regular term."

This section clearly provides that the court must be adjourned by the marshal himself, and not by the deputy, and it is just as imperative that the marshal himself should be present at the first day of the session of the court, as it is that the judge himself should be there, and that when neither the judge nor the marshal were present on the first day of the term, the term of court was lost, and when the judge came thereafter to hold court he would have

no more right to then hold the term than he would to have come two weeks afterwards, therefore the court had no legal right or jurisdiction to empanel a jury at that time and find an indictment against Jerry Wallace. For this reason the plea to the jurisdiction should have been sustained.

On the 6th day of May, 1895, Judge C. G. Foster not being able to attend, the following entry was made by the clerk: "The judge being unable to attend at this day, court was adjourned until nine o'clock to-morrow morning. —p. 17.

The court erred in attempting to correct the record in order to sustain itself in overruling the plea to the jurisdiction. The original entry made by the clerk on May 6th, stated the truth when it read, "the judge being unable to attend at this day court was adjourned until nine o'clock to-morrow morning." And when the trial judge, J. F. Williams, undertook to correct this entry and make it read, "*the judge being in the city but* unable to attend court at this day the court was adjourned *by the marshal* until nine o'clock to-morrow morning," made the record purport to state a fact that was not true, because it is admitted and was admitted in the argument of this motion that Judge Foster did not arrive in Fort Scott until nine o'clock that night, and that the court was adjourned by the deputy marshal instead of by the marshal, as stated in this journal entry.—p. 19

The motion to quash the indictment should have been sustained for the reason stated in said motion.

The court erred in requiring the defendant to go to trial on the 13th day of June, 1895, the next day after the opening of the court, because section 1033 provides:

"When any person is indicted a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving indictment, stating the place and abode of each juror and witness shall be delivered to him at least two days before the trial."

The reason of this humane section of our statute being enacted was that when a man was tried for his life he should have a full, fair and timely opportunity to know the abode and place of each juryman that he might have time given him to investigate the character of these men, and further to know if any undue influence had been brought, or could be brought to bear upon them so as to prevent them from giving him a fair and impartial trial. And also, that the name of each witness should be given to him that he might thereby know who was to testify against him thus enabling him to procure witnesses who might contradict any evidence that tended to prove his guilt or place upon his action any different coloring other than a fair and impartial interpretation governing his action in the matter for which he was to be tried.

The statute also provides that it shall be served upon the defendant and not upon his attorneys, and that he should be allowed two full days for the purpose of having this investigation and when the trial judge compelled him to go to trial without giving him the time alloted by the statutes for this examination and the procuring of witnesses, he was denied a fair and impartial trial, and for this reason, if no other alone, a new trial should have been granted.

And we confidently refer to the case of Logan vs. United States, decided by this court at the October term,

1891, reported in Vol. 12, Supreme Court Reporter, page 630, where the court makes use of the following forcible language.

"The defendant next objected to going to trial at this term of court, and especially at this day, etc. The words of the existing statute are too plain to be misunderstood. The defendant if indicted for treason is to have delivered to him three days before the trial a copy of the indictment, and a list of the jury and of the witnesses to be produced on the trial for proving the indictment; and, if indicted for any other capital offense he is to have such copy of the indictment and a list of jurors and witnesses two days before the trial. The list of witnesses required to be delivered to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of the witnesses to be produced on the trial for proving the indictment. The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet and to enable him to prepare his defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it and if he seasonably does so the trial cannot lawfully proceed until the requirement has been complied with." U. S. vs. Stewart, 2 Dall. 343; U. S. vs. Curtis, 4 Mason, 232; U. S. vs. Dow, Taney, 34; Regina vs. Frost, 9 Car. and P. 129, 2 Moody, 140; Lord vs. State, 18 N. H. 173; People vs. Hall, 48 Mich. 482, 487, 12 N. W. Rep. 665; Keener vs. State, 18 Ga. 194, 218.

The entire record from the inception to the close of the case discloses the fact that the defendant was never served with a list of witnesses or jurors before he was required to

go into the trial of said cause, and that he never waived any right, guaranteed to him under the laws of the United States.

The defendant had the right to have these jurors summonsed from the body of the judicial district of the third division of the state of Kansas, and not from a small town like Fort Scott, where the prosecutor resided and was acquainted with every one of them and might have an undue influence with them over the other attorneys, more than he would if these jurors had been summoned from the body of the district and were not the special friends of the prosecutor.

The court ordered that a panel of forty-two jurors be summoned as required by law from which the defendant would have a right to select the panel before whom he was to be tried. That the marshal in executing said order only summoned thirty-one jurors and one of them was one of the grand jurors who had found the indictment, thus denying the defendant the right to have forty-two jurors to select from. When panelling this jury when examined on their voir dire as to their qualifications to sit as jurors, the court permitted the attorney for the government to go on and examine twelve jurors as to their qualifications to sit as jurors and then turned them over to the defendant for examination instead of permitting the defendant to examine each juror and pass upon his qualifications one by one as soon as the attorney for the government had passed them. Then the court, after twelve jurors had been examined, compelled the defendant to challenge four jurors for cause at one time and then pass the challenge to the government, and then

the defendant was compelled to challenge four more at a time and thus go on until the jury was selected, which was unfair to the defendant, because he had the right to pass upon the qualifications of each juror at a time he was first examined and had a right to make his peremptory challenges, if he so desired, at the time each juror was being selected and he had a right to have forty-two unbiased jurors from whom to select the twelve who should pass upon the issues in his case.

The court erred in receiving improper evidence offered by the government against the objections and exceptions of the defendant and also erred in sustaining the objections to the cross examination of the witness.

On page 15, the question was asked on cross examination, "You know the land that was given to Mrs. Wallace?" the plaintiff objects to the witness answering this question. This was a fact about which the witness was asked and he should have been permitted to have answered the question, because the cause of the homicide grew out of the land that was supposed to belong to the defendant's wife, and which the witness knew where it was located, and that Wallace had been in possession of it and this fact should have gone to the jury. He should have been permitted to have answered the question.

The further question "You said you had trouble with Mr. Wallace?" "Yes sir, we had a little trouble." "You promised you never would go back again on the land?" To this question the plaintiff objected and the court sustained the objection. This testimony should have gone to the jury

and tended to prove that Alex Zane had taken men down there that morning to Jerry Wallace's land, who were his enemies and with whom he had had trouble and who had promised they would not go on his premises to further annoy him, and had the tendency to show the fear of bodily harm that was excited in Jerry Wallace's mind by reason of these men coming there; and this witness should have been permitted to have told the court on examination all about the trouble he had had with Jerry Wallace as it tended to prove the fear he had by these men being there under the direction of Alex Zane, they being his enemies, and it would have the tendency to take away from the minds of the jury any premeditated attempt in Jerry Wallace's mind to take away the life of Alex Zane at the time.—p. 34, conclusion of Eli Wallace's testimony.

In the testimony of the defendant, Jerry Wallace, the counsel for the defendant offered to prove that the deceased, Alexander Zane, had frequently threatened to take the life of the defendant, and that these threats had been communicated to the defendant prior to the homicide. The plaintiff objected to the evidence. Objection sustained by the court. Defendant excepted to the ruling of the court and still excepts.—p. 66.

In further examination of Jerry Wallace, the defendant, the following question was asked: "You may state what trouble, if any, you had with him prior to that time or prior to your marriage?" Objected to by plaintiff. Objection sustained. Defendant excepts.

The counsel for the defendant thereupon offered to

prove by the defendant, Jerry Wallace, that prior to his marriage to his present wife, Jane Zane, that he was driven from Zane's house at the point of the muzzle of a shot gun in the hands of Alexander Zane. Plaintiff objects to the offer. Objection sustained. Defendant excepts for the reason that said testimony, if allowed to be introduced in the cause, would have had a tendency to prove that Alexander Zane from that day had treasured up in his mind a deadly hatred for or against Jerry Wallace and that the hatred engendered as demonstrated by Alexander Zane in committing the acts that he did on that day, continued until the date of the homicide, to-wit, the 7th day of March, 1895, as is shown by the testimony of the witnesses, by the frequent threats Alexander Zane had made against the life of Jerry Wallace, and that the same had been communicated to him. See the testimony of Jerry Wallace on page of printed record, 66.

See testimony of R. C. Patterson, page 79 printed record, in which the following question was asked: "You may state if anything was said by Alexander Zane with reference to what he intended to do the next day down on Jerry Wallace's place?" Plaintiff objects. Objection sustained, to which the defendant excepts. The defendant by its counsel then and there offered to prove by the witness, R. C. Patterson, that in a conversation with Alex Zane the day before the shooting occurred, Zane said to him, that he was going down there to build a fence across this property of Jerry Wallace's the next day and if Jerry Wallace fooled with him he would kill the blind son of a bitch. Plaintiff

objects to the evidence. Objection sustained, to which defendant by his council excepted, and for reasons therefore say, that if said evidence had been admitted the defendant would have been able to prove by the said R. C. Patterson, that Alexander Zane on the 6th day of March, 1895, visited the town of Seneca in Newton county, Missouri, and after having purchased a jug of whisky met the said R. C. Patterson and in a conversation with him said he was going down to build that fence the next day, March 7th, 1895, and that he was going to take his whisky for the boys, and they were going into that field, going to erect a fence there and if Jerry Wallace interfered he would kill the damned blind son of a bitch. That the said R. C. Patterson on the 7th day of March, 1895, at an early hour in the morning of said day communicated the threats so made to him by the said Alexander Zane to the said Jerry Wallace at his home in the Wyandotte reservation in the Indian Territory, in the presence of his wife, Jane Wallace. And in pursuance of these threats he did go to Jerry Wallace's on the following morning, as he said he would do, with his whiskey and mob of men, armed with an Indian's favorite weapon of warfare—a tomahawk—as shown by the testimony of Eli Wallace, page 45, surrounded with his men who he knew were enemies of Jerry Wallace, —see page —— of record—and did proceed to take forcible possession of Wallace's land over and against the peaceable protest of Jerry Wallace and his wife. This evidence should have gone to the jury as it tended to prove, and did prove, that Alex Zane had sought the controversy, went there armed

for the fight, driving Wallace from the peaceful possession of his farm, and Zane taking possession of it. This testimony, if permitted to go to the jury, proved that Wallace had no premeditated malice toward the life of Alex Zane, and surrounded as he was at that time by Alex Zane and his men ; through fear, intimidation, or sudden passion he fired the fatal shot. If it was not clearly in self defense, it certainly proved, or tended to prove, that there was no premeditated malice towards Alex Zane, and would prove to the jury that Jerry Wallace was not guilty of premeditated murder. There is quite a conflict in the testimony as to the exact time the fatal shot was fired. The defendant, Jerry Wallace, in his testimony on page 65 of the printed record says, that he was struck in the back by the boy before he fired the shot ; that afterwards he pointed the gun at the boy to stop him from butchering him. See printed record page 70.

See also testimony of Frank Denmark, a witness for the plaintiff on page 41, printed record, who says that young Zane was right by the side of Wallace when the shot was fired, and that after Wallace had frightened him away by pointing the gun at him he immediately went to his father and took his tomahawk off of his father's person. See also the testimony of Lafayette Louis, page 73 printed record, who says that the moment the boy struck Jerry with his knife then the shot was fired. This all tends to show that there was no time for any premeditated malice that would justify the jury in coming to the conclusion that Jerry Wallace was guilty of premeditated murder.

Taking this testimony altogether, the testimony shows that Alex Zane and his boy went there, with a mob, one armed with a tomahawk and the other with a knife determined to build that fence across that land and take possession of it, even if they did it at the expense of taking Jerry Wallace's life as aforesaid.

See testimony of Charles Luke at pages 79 and 80, printed record, in which the following question was asked: "Now I will ask you to state what that conversation was?" Said question referring to a conversation witness had had with Alexander Zane the day previous to the homicide. Plaintiff objects. Objection sustained, to which the defendant excepted. Defendant thereupon, by his counsel, offered to prove that in the conversation above referred to with Alexander Zane that said Alexander Zane said to this witness that he was going down to build a fence across Wallace's land and if Jerry Wallace interfered with him that he would kill him, or shoot the blind son of a bitch, and that all these threats were communicated by witness to Jerry Wallace on the morning, and prior to the homicide on the 7th day of March, 1895. Plaintiff objects to the evidence. Objection sustained, to which ruling the defendant excepts for the reason above stated.

In the testimony of Mrs. Alice Sargent at page 80 and 81 the following question was asked: "In that conversation you may state if any threats were made by Alexander Zane against the life of Jerry Wallace?" Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts. The defendant, by counsel, then offered to prove

by this witness that on this occasion Alexander Zane said to this woman, and threatened that he would kill Jerry Wallace and that he had a knife that he was carrying at that time for that purpose and that these threats were communicated to Jerry Wallace by this witness afterwards. Objected to by plaintiff. Objection sustained, to which ruling of the court defendant excepts for the reason, that if the testimony of this witness had been allowed to have gone to the jury it would have tended to prove, and would have proven, that witness had known the deceased Alexander Zane a long number of years for quarrelsomeness and for at all times having on and about his person a dangerous or deadly weapon, and especially, his hatred of Jerry Wallace on account of said Jerry Wallace having married his daughter. That said evidence would have further tended to show that on the occasion referred to Alexander Zane had in his belt a large butcher knife; that he removed it from his belt, exhibited it to the witness, and said that he intended with that knife to take the life of Jerry Wallace.

In Samuel Taylor's testimony at page 82 and 83 printed record the following question was asked: In that conversation did Zane say anything about Jerry Wallace as to doing something to him, and if so, what was it? Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts. The defendant, by his counsel, then offered to prove by this witness that on the 6th day of March, the day before the homicide, he met Alexander Zane and had a conversation with him in which Alexander Zane said that he would kill Jerry Wallace if he interfered

with him in any way, and that these threats were communicated to defendant. Plaintiff objects. Objection sustained, to which ruling of the court the defendant excepts.

In the testimony of Samuel Collins at page 83 defendant offered to prove by this witness that at a time shortly before the 7th day of March, 1895, that he met Alexander Zane and had a conversation with the said Alexander Zane about Jerry Wallace and that in that conversation he, Alexander Zane, threatened to kill Jerry Wallace, and said to this witness that at one time he made him look down a muzzle of a double barrelled shot gun and he wished he had killed him at that time, and that these threats were communicated to defendant. Objected to by plaintiff. Objection sustained, to which ruling of the court defendant excepts.

The testimony of Mary Crow at pages 83 and 84 the following question was asked: In that conversation did he threaten to do something to Jerry Wallace, if so, what was it? Plaintiff objects. Objection sustained, to which ruling of the court defendant excepts. Thereupon the defendant by its counsel offered to prove by this witness that at this time she heard Alexander Zane say that he intended to, and would, kill Jerry Wallace and that she communicated these threats to Jerry Wallace. Plaintiff objects to the evidence. Objection sustained, to which ruling defendant excepts, for the reason that Mary Crow, the witness whose testimony was offered, was a stepdaughter of Alexander Zane, the deceased; that she had lived with the family of Alexander Zane all her life, that she knew the character of Alexander Zane, and knew that that character for peace

and quietude was bad. The testimony of said witness would also have tended to prove that the said Alexander Zane in his life time was involved in many quarrels and difficulties; that for a number of years previous to the homicide he had at all times, and on all occasions gone armed; that he carried a tomahawk, and butcher knife; that since the marriage of Jerry Wallace to Jane Zane, his daughter, he had, on numerous occasions, exhibited the butcher knife to witness and said that he would take the life of Jerry Wallace with this knife as soon as an opportunity presented itself; that he also would exhibit the tomahawk and show witness by demonstration with what accuracy he could throw the tomahawk and said to said witness that he could cut the head off of Jerry Wallace twenty-five feet distant with said tomahawk.

The record abounds with offers to prove threats against the life of Jerry Wallace by Alex Zane. The court excluded all the testimony offered on this subject to which the defendant, by his counsel, duly excepted at the time, as shown by printed record, the pages of which have been noted in this argument. The threats by Zane against the life of Jerry Wallace, as disclosed by the evidence commence some years before the homicide, and continued up to, and including the very day of the homicide. The adjudications on the subject of communicated threats, so far as our examination of the authorities of the several states has extended tend to show, and do show, that "Threats by deceased against the defendant, which were frequent and continuous down to the time of the killing,

and all blended together and inseparable, would be considered as a part of the res gesta, and evidence touching them would be admissible to explain the act and show whether defendant acted in necessary self defense." For a decision of the question here involved, see case of the State of Missouri vs. Sloan, 47 Mo. 604; Campbell vs. People, 16 Ills. 17, and the cases there cited, in which the doctrine is laid down that when threats against the life of a person are made which creates a fear in his mind of great bodily harm or death, are permissible and should go to the jury in order that they might thereby be better enabled to determine whether the offense committed was caused by apprehension and fear of great bodily harm upon the part of defendant, and tends to disprove the question of premeditated malice, and should there be a question of premeditated malice thus raised the prisoner at bar would be entitled to the benefit of the doubt and at most could only be found guilty of manslaughter.

The instructions presented by counsel for the defendant and refused by the court should have been given; they embody correct propositions of law, as applicable to the facts in the case to the refusal of the court to give the instruction thus prayed the defendant by his counsel duly excepted at the time, and still excepts—pp 111 to 117 inclusive.

Thereupon the court gave the following instructions to the jury, on his own motion, to the giving of which instructions the defendant by his counsel duly excepted at the time, for the reason that said instructions cannot be

sustained either upon reason or authority—pp 117, 118, 119 and 120.

The record in this case abounds in errors, and while it may be difficult to determine the exact theory upon which the case was tried by the defendant in error and the court below, it is not difficult to determine, after reading the evidence and instructions, and pleadings and ruling, in the court below that there is no theory which finds sanction in the law that will uphold the judgment, and we submit the case with implicit confidence that whatever is right in the premises will be done.

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FILED.
MAR 2 1896
JAMES H. MCKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JERRY WALLACE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 731.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JERRY WALLACE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 731.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

Jerry Wallace was convicted at the May term, 1895, of the district court of the United States for the district of Kansas, on an indictment found against him at that term for violation of section 5339, Revised Statutes, and which charged that on or about the 7th of March, 1895, at the Wyandotte Indian Reservation, the same being a place and district of country under the exclusive jurisdiction of the United States, he did, with force and arms, assault one Alexander Zane, and did kill and murder him by shooting him with a shotgun loaded with bullets.

THE CASE.

From the evidence certified in the record the following appear to be the material facts established:

Jerry Wallace, the defendant (plaintiff in error here), lived in the Wyandotte Reservation, about 20 miles southeast from Baxter Springs, on a piece of land owned by his wife and on which they had resided for four or five years.

Alexander Zane, who was an Indian of the Wyandotte tribe, lived about a mile west from Jerry Wallace, in the same valley or ravine.

In 1890 or 1891 Jerry Wallace married Jane Zane, who was a daughter of Alexander Zane, deceased. Between Alexander Zane and Jerry Wallace estrangement and ill feeling had for a long time existed, either caused or else sustained by a dispute and controversy between them as to the true boundary line of the land owned or claimed by Jane Wallace, and on which she resided, and the lands of Julia Zane.

Surveys had been made and patents had issued; but the true boundary line, if established by the surveys, was not accepted by the parties.

On the 7th day of March, 1895, about 7 o'clock in the morning, Alexander Zane, accompanied by Eli Wallace, William P. Bailey, and Noah Zane, who was a son of Alexander Zane, left Zane's house with two wagons and proceeded to a point on his farm where some posts had been made, which they then loaded on the wagons and went in the direction of the land on which Jerry Wallace resided. On the way they were joined by John

Lamont, and the five men together, with the wagons, entered the field occupied by Jerry Wallace and which he was at that moment engaged in plowing. This was about 8 o'clock in the morning. They entered at the southwest corner through a gap in the fence made by the deceased, and they proceeded in a northeasterly course across the field to the fence on the eastern side, and there began to unload the posts and to plant or drive them into the ground along the fence line which they proposed to establish.

Jerry Wallace and Frank Denmark were engaged at that time in plowing the field; they were plowing in different parts of the field and moving in opposite directions.

When Zane and his party entered the field and were moving northeastwardly across it, Jerry Wallace was plowing toward the eastern side of the field, which he had reached and was returning when Zane and his party passed about 50 or 60 yards south from him, moving in their northeasterly course. Wallace did not see Zane until just before he passed; and then he called to him and said, "Alex Zane, if that is you, take your force and get out of this field." Wallace had sore eyes and an impaired eyesight. Zane does not appear to have made any reply to this command of Wallace, but went on his way. Wallace continued on with his plow until he reached a ravine that ran north and south through the field, where he halted, unhitched his horses from the plow, and took them to his barn. In about half an hour he returned to the field with a double-barreled shotgun

in his hand; he passed within 6 feet of a group of persons consisting of Frank Denmark, Emma Denmark, his daughter, Lafayette Lewis, and Mrs. Jerry Wallace. Wallace, in passing, said to his wife, "Now, Janie, I want you to order these men out of here." Mrs. Wallace then did order Alexander Zane and those who were with him to leave, but they do not appear to have paid attention to her; then Wallace ordered Zane to leave and said to him, "Are you going?" Zane was standing with his right hand on a post he had driven in the ground and his left arm hanging by his side; eight or nine persons, standing within easy hearing distance, heard Wallace's remark to Zane, but heard no reply from Zane.

Jerry Wallace, testifying in his own behalf, speaks of threats made to him at the time by Alexander Zane in words and by gestures, and Lafayette Lewis confirms Jerry Wallace in this statement; but none of the other persons who were present and who had equal opportunity of seeing and hearing all that could have been seen or heard by Wallace or by Lewis sustained them in this regard. No one else heard or saw any word or gesture proceed from Alexander Zane.

When Wallace said to Zane, "Are you going?" he immediately raised his gun, aimed it at Zane, and fired, shooting Zane in the left breast. Zane walked off about 30 feet and fell, and when those nearest reached him he was dead.

When Wallace fired his gun at Zane, Noah Zane ran up and stabbed him in the shoulder with a pocket knife, whereupon Wallace turned and pointed his gun at Noah and pulled the trigger, but the gun snapped.

When Alexander Zane fell, his son Noah ran to him and took from his person a small hatchet, which was the only thing in the way of a weapon found upon him.

There was evidence of threats made by Alexander Zane against Wallace, some of which had been communicated to Wallace, and which Wallace testified caused him to fear that Zane was about to take his life. There was also some evidence of threats made by Wallace against Zane.

Jerry Wallace appeared on the trial as a witness in his own behalf. On his cross-examination, the following occurred (p. 68):

Q. What did you take it (gun) down there in the field for?

A. For protection.

Q. For protection?

A. Yes, sir.

Q. You would not have needed any protection if you had not gone down there?

A. I thought I had a right to go in my own field.

Q. But if you had not gone back into the field you would not have needed protection?

A. Probably.

Q. If you thought that was your field, and that Mr. Zane was trespassing on your property, why didn't you go to the courts and settle it there instead of taking a shotgun and settling it with that?

A. I had it in the courts about three years, and the court had settled and gave this land to us.

Q. And so you thought you would go down there and settle their decree with a shotgun?

A. I thought I was justified in going down there and looking after our own property.

Q. Don't you know that is not true?

A. Possibly I do.

Q. Don't you know that your wife didn't own that land? And didn't you know then that your wife didn't have any more title to that land than I have?

A. I think to this moment that she had a title to it.

In his examination in chief Mr. Jerry Wallace gave the following version of the affair (p. 64):

Well, on this day, the 7th of March, I was plowing in the field, and my wife came down in the field and told me that Mr. Zane——

Q. Mr. Zane came down in the field there, and when he come within 40 or 50 yards I asked of him if that was his force; and if so, to take it and get out of there; that he had no right there.

I stopped and ordered him out two or three or four times, and he kept continuously on until he got to the east end of the field, and I went on through to the west end and took my team out and took it to the barn. I didn't like the conduct of these people; they were noisy, hollering and singing, and acting as if they were drunk to me, and I guess no doubt was. And I came past the house after putting my team up, and I took my shotgun and went down into the field. I went up pretty close to Mr. Zane and ordered him out three or four times, and then I think I asked him if he was going out, and he made no reply just at that time, and then I asked of him whether he was going or not, and about this time I was struck in the back and Mr. Zane made a grab like this [indicating], and he was standing with his right hand on the post; about the time I was struck in the back he made this motion [indicating] and says, "Damn you, I will kill you," and then my wife hallooed, or at least she said, "Look out, Jerry," and I fired this gun.

Q. State why you took that gun down in the field.

A. Because I was afraid of this party, and most especially of Alex. Zane himself, and I didn't feel safe without some protection.

Q. Why did you feel afraid?

A. I had heard of his threats to me and had had different things communicated to me.

Q. What were these threats about?

A. That he would kill me.

(Plaintiff objects because threats are inadmissible in this case in present condition; objection sustained; defendant excepts.)

Q. You may state, Mr. Wallace, what Zane did at that time just before you fired the shot.

A. He just took his hand something like this [indicating], saying, "Damn you, I will kill you."

Q. You may state to the jury from that demonstration what you believed Zane was about to do.

(Plaintiff objects; objection sustained; defendant excepts.)

ASSIGNMENTS OF ERROR.

The following are assigned as the errors relied on by the plaintiff in error here (p. 19):

I.

The court erred in sustaining the defendant's demurrer to the defendant's plea to jurisdiction.

The plea to the jurisdiction will be found on page 4, and appears to rest on many grounds, both of law and fact.

1. That the law requires the judge to make a written order, directing the marshal to adjourn the court.

Reply: Section 672, Revised Statutes, provides that the judge may, by written order, addressed to either the marshal or the clerk, adjourn the court. The law does not provide for the judge directing the marshal to adjourn the court. Section 671 does authorize the marshal to adjourn the court in the absence of the judge.

2. That the deputy clerk adjourned the court "without any *authority in law* so to do."

Reply: Section 672, Revised Statutes, provides "the authority in law" to the clerk to act under the written order from the judge to declare the court adjourned. This plea does not negative such written order from the judge to the clerk.

The deputy clerk has authority in law to perform the duties of the clerk in the courts in Kansas. (Supp. R. S., pp. 608, 744.)

The deputy clerk in this case declared the court adjourned. *Non constat*, so far as this plea is concerned, that he did not act under the written order from the judge.

3. That the Hon. C. G. Foster, judge of said court, was present at the court-house on Tuesday, 7th of May, 1895, and commenced the work of said term so as aforesaid adjourned without authority of law to that day. That he impaneled a grand jury, and that grand jury found this bill of indictment against this defendant.

Reply: The right of the judge to preside in the court and conduct the proceedings of the court can not be questioned by a plea to the jurisdiction, but by a proceeding directly against the judge and to which he is a party.

On the grounds above stated it is evident that the court was properly adjourned so far as this plea is concerned.

> The plea to the jurisdiction being dilatory must be certain to every intent; the highest degree of certainty is required.
> (Clark's Crim. Proc., p. 375.)

III.

The court erred in denying the motion to quash the indictment and for the discharge of the defendant, supported by the plea to the jurisdiction.

This is sufficiently answered in the reply to the foregoing.

IV.

That the court erred in requiring the defendant to go to trial in this action on Thursday, June 13, 1895, for the reason that the panel was made up as aforesaid, and because the court directed that a copy of the list of jurors should be served upon the defendant's attorney instead of upon the defendant, which was not done, and two days have not elapsed from any service of the list of jurors before the defendant was required to go to trial.

So far as this assignment is intelligible the first ground of it has been already answered in the reply to the plea to the jurisdiction. To the second ground, that a list of jurors had not been served two days before the defendant was required to go to trial, it may be enough to reply that the record here does not show that such was the fact. The bill of exceptions in this case will be found on page

22, and it opens with the statement that the cause came on for trial before the court and jury, and the jury having been duly empaneled and sworn to try the issues herein joined, the Government, to maintain the issue upon its part, offered the following evidence; and then the evidence in the case immediately follows. There is nowhere in the bill of exceptions any statement as to what preceded the empaneling of the jury. It nowhere appears, even in the record of the daily proceedings, that the list of jurors was not furnished the defendant within the time required by law.

Section 1033, Revised Statutes, provides that a list of the jury shall be delivered to a person indicted of any capital offense at least two entire days before the trial.

If such copy was not requested before pleading at the trial, no objection can afterwards be taken.

(*United States* v. *Cornell*, 2 Mason, 91; *United States* v. *Curtis*, 4 Mason, 232.)

Defendant not entitled to such list at Government expense.

(*United States* v. *Williams*, 4 Cranch, C. C., 1.)

VI.

To the ruling of the court in excluding the testimony of Samuel Collins, as to Alexander Zane's character for quarrelsomeness.

The testimony of this witness will be found on page 60. He was called on behalf of the defendant.

> Q. Are you acquainted with Alexander Zane's character for quarrelsomeness?
>
> A. Yes, sir; well, not to say I do myself, only what I have heard from others is all I know about it.

> Q. I will ask you what that character and reputation was in the community for quarrelsomeness?
> (Plaintiff objects; objection sustained; excepted to by the defendant.)

The character of Alexander Zane for quarrelsomeness was not relevant to the issue which this jury were sworn to try. He may have been the most quarrelsome man in the world, but that afforded no excuse, or justification, to the defendant here for killing him.

Wharton, in his Criminal Evidence (8th ed. sec. 68), says:

> Hence, when the defendant offers to prove as a defense that the deceased was a man of ferocious character, or an assassin, or a highway robber, or a garroter, this, by itself is irrelevant.

There is nothing in this case to indicate that Zane's character was a potential element in the transaction which resulted in his killing.

The same witness testified, in immediate connection, that prior to March 7 he had had a talk with Alexander Zane about Wallace; that in February or January, he didn't know which, he rode from the town of Seneca in a buggy with Zane, and he was asked this question:

> Q. In his conversation with you, did he make any threats towards Jerry Wallace?
> (Plaintiff objects; is incompetent now; objection sustained; defendant excepts.)

There are several other assignments of error on this same ground of the refusal of the court to admit evidence before the jury of threats made by Alexander Zane against the life of Jerry Wallace, some of which

threats were communicated to Wallace, and, he says, inspired him with fear of Zane.

Dr. Wharton, in treating of the question of the admissibility of evidence of threat made by deceased when offered by defendant in his behalf, says (Wharton's Criminal Evidence, 8th ed., sec. 757):

> Certainly if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by the deceased, then it is irrelevant. * * * On the other hand, if the question is as to which party in the encounter is the assailer, then it is admissible to prove by the prior declaration of either that the attack was one he intended to make. Threats to this effect by the defendant are always admissible, and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of threats by the deceased.

On which of these two grounds the evidence was offered here does not appear. If offered as a justification or excuse for the act of the defendant, no evidence in this case, not even the testimony of the defendant himself as given above, can make it relevant.

He does not claim or pretend that he apprehended any danger to himself from Alexander Zane then and there; he says that Zane kept his right hand on the post and made a motion (which must have been with his left hand) toward his breast, saying, "Damn you, I will kill you."

It is clear and undisputed from this evidence that Zane was not armed or at all prepared to make a hostile assault on the defendant.

Passing by the testimony of all the other eyewitnesses, and accepting the testimony of the defendant and of Lafayette Lewis as a true statement of the fact, and giving to the facts as they represent them their fullest force and significance, yet still they afford no ground or color for the supposition or belief that Wallace was in danger at that time from Zane or even believed himself to be.

If the evidence is offered for the purpose of showing which party was the assailant, then that question does not arise on the evidence here at all. There is no dispute as to who was the assailant. The defendant admits, and all the witnesses concur in the statement, that he was the assailant. So there would seem to be no room to question the propriety of the ruling of the court in excluding the evidence.

In *Wiggins* v. *People*, *etc.*, in Utah (93 U. S., 467), Mr. Justice Miller, delivering the opinion of the court, and commenting upon the admissibility of the evidence of threats made by the deceased, quotes from Wharton's Criminal Law (sec. 1027):

> Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life.

In that case there was but one eyewitness to the homicide; and he swore that he could not tell where the first

shot came from, though he knew the defendant only fired three.

The court say, in reversing the judgment of the lower court, on the ground that the evidence of threats had been excluded from the jury:

> It must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said "he would kill defendant before he went to bed that night," it would have tended strongly to show where that first shot came from, and how that pistol, with one chamber emptied, came to be found upon the ground.

But there was no such evidence in this case to raise a doubt or question as to who began this assault as would make evidence of decedent's threats admissible.

VII.

This was to the ruling of the court in sustaining the objection of plaintiff to the following question on page 65. Wallace, the defendant, was testifying as above recited, and the following question was put to him by his counsel:

> Q. You may state to the jury from that demonstration what you believed Zane was about to do.
>
> (Plaintiff objects; objection sustained; defendant excepts.)

The only significance to be attached to this is that Mr. Wallace's guilt, or the degree of it, is to be ascertained and determined by the belief which Zane's actions at the moment induced on his mind.

We have Zane's actions graphically described by the defendant himself. What he believed Zane was about

to do can be a subject of no sort of importance here so long as it is apparent, as it is, that Zane was not going to injure him. He had no means of injuring. He had no weapon in his hand and none about his person except the little hatchet which his son took from his person after he had fallen. His right hand, the defendant himself admits, was never removed from the post on which it rested; only with his left hand did he make the gesticulation spoken of.

The defendant nowhere states or intimates that he was apprehensive of immediate, instant assault or danger from Zane.

To be sure, the defendant's intention is the crucial fact in this case. The prime inquiry here is, Did he intend to kill Zane? He admits that he did. He does not claim that he intended to kill him, because he feared that if he did not kill him then that Zane would then either kill him or do him serious bodily harm. It was not what defendant says that he believed, or what in fact he did believe, but what, under the circumstances, he had a reasonable right to believe, that is to be considered here.

IX.

In refusing to permit the defendant, Jerry Wallace, to state to the jury the result of the controversy over the title to this land in the Indian court.

It appears that on the redirect examination of Mr. Wallace, the defendant, he was asked by his counsel (pp. 71, 72) a number of questions as to the title to the land occupied by his wife and himself, all of which were

objected to by the Government and all of the objections were overruled except one on page 72, which was an inquiry as to the result of the controversy in the Indian courts between Zane and Wallace. The district attorney appears to have objected on the ground that Mr. Wallace's statement as to the result of that litigation would not be the best evidence. He might have objected also, if he did not, on the ground that it was altogether irrelevant to the issue here.

The merits of a controversy between two parties as to the title of land, while it may have been the occasion of the homicide, certainly can not be admitted in evidence before a jury who are trying the single question of guilt or innocence of the slayer. Whether Wallace's wife was the rightful owner of the land or not, if he was in possession with her of the land, under her claim of title, he had as much right to protect that possession as if her title was undisputed. But whether her title was good or bad he had no right to protect it with a shotgun.

X AND XI.

These were to the rulings of the court in refusing to admit in evidence a photograph and a plat of the land.

The testimony will be found on page 77 of the record. Mr. Lewis, a witness for the defendant, is on the stand. He had been examined in chief and then cross-examined, when counsel for defendant, on redirect examination, produced to his witness a photograph and said:

> Q. I will ask you, Mr. Lewis, if you recollect that [handing witness a photograph]?
>
> A. Yes, sir.

Q. What is it?

A. That is a photograph of the position of the people that were in the field that morning. At least it looks like the field they were in.

Q. This point up here being the east side?

A. Yes, sir.

CHEESEMAN. We offer this photograph in evidence.

(Plaintiff objects, for the reason that it was not taken at the time of the murder; objection sustained; defendant excepts.)

The very witness to whom the photograph was shown does not seem to be very certain about it. He certainly did not take it. He only thinks it looks like the field. But how a photograph taken long after the transaction could show the relative position of the persons present when the transaction took place is difficult to see. The photograph is proven by nobody. It will be impossible for anyone to have rendered it admissible in evidence. It is not a picture of what occurred; it was merely a second-hand, hearsay narrative made, not under oath, by someone not known, and expressed in the form of a photograph.

It was admissible on no ground.

The plat of the survey is referred to in the testimony of S. R. Patterson (p. 77).

From that testimony and the rulings of the court, so far as they appear therein, it does not appear that the plat was rejected by the court. On the contrary, it would seem, from pages 77 and 78, that both the survey and the patent were admitted in evidence before the jury.

On page 81, Hugh Lester, introduced as a witness on the part of the defendant, testified that he had assisted in a survey of the land made by Mr. Powers; that he was a chain carrier. And, again, the only part of his testimony which was rejected was certain declarations made to him by Alexander Zane.

XII, XIII, XIV, XVII, XVIII, XIX.

These relate to threats alleged to have been made by Alexander Zane, the deceased, against Jerry Wallace, the defendant.

We have already considered to some extent the question of the admissibility in evidence for the defendant of threats alleged to have been made against him by the deceased.

If the evidence in this case afforded any ground whatever for doubt, conjecture, or speculation as to who began the assault here, or, indeed, whether the deceased took any active part whatever in the transaction which resulted in his death; whether he was not throughout passive, inert, unresisting, there might perhaps be some room for the insistence that evidence of previous threats by the deceased should at least go before the jury in order that they might determine, under the light of such testimony, who in all probability incited or began the attack. Or, if the evidence induced any doubt as to the exact character and significance of Jerry Wallace's attitude in the matter, whether he fired the shot in self-defense, or because he believed himself to be in danger at that time, then perhaps the evidence should have been admitted.

But Jerry Wallace's own testimony in this case repels any such inferences as these.

Wallace testified (p. 64) that he took his gun to the field because he was afraid of the party, and most especially of Alexander Zane himself, and he did not feel safe without some protection; that he had heard of Zane's threats that he would kill him; but he says, in that same narrative, that he left the field, put his horses in the barn, went to the house and got the gun and went down into the field and went up pretty close to Mr. Zane and ordered him out three or four times; and that Zane made no reply; and he asked him whether he was going out or not; and that Zane standing with his right hand on the post made a motion and said, "Damn you, I will kill you;" and Mrs. Wallace said, "Look out, Jerry," and then he fired the gun.

Now, taking that statement as it stands, it affords no ground for the suggestion that Wallace apprehended any danger from Zane at that time and there. Wallace had withdrawn from the field with his horses; he was remote from Zane and his party; he was in a place of safety, yet he armed himself and returned to the field and went very close up to Zane; and he nowhere intimates that Zane was armed or was in a condition to take his life or do him serious bodily harm.

It is true that a bad state of feeling had existed for a long while between these men. It is true that Zane was doing a wrong thing in invading the premises occupied by Wallace and attempting to build a fence across that land. It is in evidence that Zane and his party took a jug of whisky with them, and they drank some of it;

and the defendant offered to prove by R. C. Patterson (p. 79) that he had a conversation with Alexander Zane on the day before the homicide, in which Alexander Zane stated to the witness that he had got that whisky for the purpose of bracing himself up for the purpose of building this fence across the land of this defendant, Jerry Wallace.

On objection by the plaintiff the court excluded this testimony. But suppose that, instead of excluding, the court had admitted it, how would it have affected the result on the issue which the jury were trying?

The witness testifies that in that conversation Zane said to him that he was "going down there to build a fence across this property of Wallace's the next day, and if Jerry Wallace fooled with him he would kill the blind son of a bitch."

It is proven, and not controverted, that Alexander Zane, on the occasion of the homicide, was not armed with any weapon with which he could shoot; he had neither gun nor pistol. His threat, then, was mere idle vaporing, empty and unmeaning, without any purpose on his part of carrying it into execution. The gesture which Wallace says that Zane made was not one which indicated that he was about to draw a pistol or a weapon from his person. Wallace says (p. 65), "Mr. Zane made a grab like this [indicating], and he was standing with his right hand on the post." His making a grab must have been an outward movement of his hand, away from his person; and with his left hand, because his right hand remained on the post. So it must have been present to the mind of Wallace at that moment that Zane was not then, at least, about to carry this threat into execution. Wallace was

assured from this gesture that it indicated no purpose on Zane's part to shoot him. Zane had not declared to Patterson that he had got the whisky for the purpose of bracing himself up to shoot Wallace, or to attack him; but to brace himself up for the purpose of building the fence across the land of Wallace.

All the threats, then, which had been made by Zane and communicated to Wallace went for naught, because, when the moment for their execution had arrived, Wallace was convinced from Zane's gesture, his attitude, and his declaration that he had no purpose of attacking Wallace then and there.

The threats, then, in the light of Wallace's own testimony, were wholly irrelevant to the issue as then presented.

XV.

This is to the refusal of the court to permit Hugh Lester, a witness for the defendant, who had assisted in the survey of the land made by Mr. Power, to testify that Alexander Zane had said to him "the reason why he wanted to carry this chain on this line was that they wanted to gain 4 feet on each chain in order to make his corner where he wanted it; and he further said that "Boys, if you ever tell of this I will break your heads with sticks."

In a suit between Wallace and Zane for the recovery of the land it may have become pertinent to impeach the survey made by Power, in which Zane had taken part as the chain carrier; and for that purpose this testimony might have been relevant. But it certainly could have

no sort of relevancy to the issue here, which was, whether Wallace had killed Zane with a criminal intent. Zane may have been guilty of very improper conduct in making this survey, as he was guilty of improper conduct in making this violent and unlawful entry upon the land for the purpose of building the fence; but such conduct of Zane affords no justification or palliation of Wallace's conduct in taking Zane's life. The courts were open to Wallace; he should have sought his redress there; and the protection of the law would have defended him from the assertion of his claim of title and possession to final judgment and execution in his favor.

There are other errors assigned in the record, but the subject-matter of them is embraced in those already considered.

There is other evidence in the record tending to show the deliberation and previous preparation of the prisoner to commit the crime with which he is charged, which I have not thought necessary to consider; evidence tending strongly to show that when he left the field and put his horses in the stable he went half a mile to a neighbor's house to get the gun with which he returned to the field and took the life of Alexander Zane. I have thought it necessary to consider only enough of the evidence introduced by the prosecution to support an intelligible presentation of the questions involved in the assignments of error.

HOLMES CONRAD,
Solicitor-General.